Supreme Court, U.S.
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No. _____

In The Supreme Court of the United States

JOHN F. McLEAY, M.D.,

Petitioner,

v.

BERGAN MERCY HEALTH SYSTEMS CORP., doing business as Bergan Mercy Medical Center,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Nebraska

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. When a hospital peer review board arbitrarily suspends a physician, is expert testimony about the physician's compliance with the standard of care relevant to the question of whether the board acted reasonably for the purposes of the immunity provisions of the Health Care Quality Improvement Act of 1986 ("HCQIA"), 42 U.S.C. §§ 11101, 11111-11115, 11131-11137, 11151-11152 (2000)?

II. Whether the HCQIA creates an "unconventional twist" in the summary judgment standard by shifting the burden of proof and thereby requiring the nonmoving party, John F. McLeay, M.D. ("Dr. McLeay"), to prove that a reasonable jury could find that the peer review process at Bergan Mercy Health Systems Corp. ("Bergan") was unreasonable.

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OPINIONS BELOW

The final opinion of the Supreme Court of Nebraska is set forth in the Appendix at A-1, and is reported at 714 N.W.2d 7 (Neb. 2006). The order granting a rehearing by the Supreme Court of Nebraska is set forth in the Appendix at A-22, and is not reported. The opinion of the Supreme Court of Nebraska prior to rehearing is set forth in the Appendix at A-23, and is reported at 708 N.W.2d 592 (Neb. 2005). The order granting summary judgment after remand is set forth in the Appendix at A-41, and is not reported. The opinion of the Court of Appeals of Nebraska is set forth in the Appendix at A-48, and though not designated for permanent publication is available at 2001 WL 185263 (Neb. Ct. App. 2001). The order entering judgment after the jury trial is set forth in the Appendix at A-62, and is not reported.

BASIS OF JURISDICTION

The statutory provision for this Court's jurisdiction is 28 U.S.C. § 1257 (2000). The Nebraska Supreme Court issued its opinion in this case on May 19, 2006. This Petition was filed within 90 days of that date and is thus timely.

STATUTES INVOLVED

42 U.S.C. §§ 11101, 11111, 11112, 11151 (2000). Pursuant to Sup. Ct. R. 14(f), the text of these statutory provisions is set forth in the Appendix at A-64.

STATEMENT OF THE CASE

Peer review boards are in place at most hospitals and at many private physician offices and Health Maintenance Organizations. In 2000, there were 813,770 physicians practicing in the United States, of which 630,463 provided either office-based or hospital-based patient care. American Medical Association, Physicians in the United States and Possessions by Selected Characteristics, http://www.ama-assn.org/ama1/pub/upload/images/373/internettable.gif (last visited July 19, 2006). Physicians are also often subject to peer review because they utilize hospital privileges when they admit patients.

Hospitals may suspend or revoke these privileges as disciplinary action against a physician. A national survey of 4,743 short-term, nonfederal, general medical/surgical hospitals throughout the United States reported 3,328 privileges actions between 1991 and 1995. Laura-Mae Baldwin et al., *Hospital Peer Review and the National Practitioner Data Bank*, 281 JAMA 349 (1999). The overall rate of privileges actions against physicians nationwide is 2.36 actions per 100,000 hospital admissions, a number which may be understated due to hospital and peer review boards' incomplete reporting. *Id.*

A peer review board at Bergan suspended Dr. McLeay's surgical privileges in 1993. *McLeay v. Bergan*

Mercy Health Sys. Corp., 714 N.W.2d 7, 11 (Neb. 2006). Shortly thereafter, the Bergan peer review board falsely reported to the National Practitioner Data Bank ("NPDB") that Dr. McLeay had been suspended because of "incompetence, negligence, and malpractice." *McLeay v. Bergan Mercy Health Sys. Corp.*, 2001 WL 185263, *3 (Neb. Ct. App. 2001) (not designated for permanent publication), App. A-54. Bergan agrees that Dr. McLeay was never found to be liable for incompetence, negligence, or malpractice.

Dr. McLeay sued Bergan for breach of agreement and breach of Bergan's bylaws, and a jury awarded him $451,001.00. *Id.* at 3, App. A-54. Bergan appealed and the Nebraska Court of Appeals vacated the jury's verdict, reversed and remanded the case for a new trial, holding that the District Court erred in admitting expert testimony on a question of law unrelated to this petition. *Id.* at 7, App. A-61. On remand, the District Court granted Bergan's motion for summary judgment, holding Bergan immune from liability for damages under the HCQIA. *McLeay v. Bergan Mercy Health Sys. Corp.*, 708 N.W.2d 592, 597 (Neb. 2005), App. A-29.

Dr. McLeay appealed and the Nebraska Supreme Court initially reversed the summary judgment and remanded the case for trial, concluding that the District Court erred in granting summary judgment to Bergan because there were still disputed issues of material fact related to Bergan's claimed immunity under the HCQIA. *Id.* at 601, App. A-39. However, the Nebraska Supreme Court later granted Bergan's motion for rehearing and reversed itself, affirming the District Court's original grant of summary judgment on the grounds that Bergan was immune from damages under the HCQIA. *McLeay v. Bergan Mercy Health Sys. Corp.*, 714 N.W.2d 7, 18 (Neb.

2006), App. A-20. In reaching this decision, the Nebraska Supreme Court held that section 11112(a) of the HCQIA creates a presumption in favor of hospitals which cannot be rebutted by expert testimony about whether the physician under review actually met the standard of care. *Id.* at 17, App. A-17. Consequently, the court concluded that Dr. McLeay "failed to rebut the presumption that the review committee acted reasonably." *Id.* at 18, App. A-18.

ARGUMENT

I. Relevance of Expert Testimony

A conflict exists between the United States Court of Appeals for the Tenth Circuit and most other courts on the question of whether evidence of contrary expert opinions is relevant to the reasonableness of peer review under the HCQIA. In order to receive immunity from damages under the statute, a professional review action must be taken:

> (1) in the reasonable belief that the action was in furtherance of quality health care,
>
> (2) after a reasonable effort to obtain the facts of the matter,
>
> (3) after adequate notice and hearing procedures are afforded to the physician involved or after such other procedures as are fair to the physician under the circumstances, and
>
> (4) in the reasonable belief that the action was warranted by the facts known after such reasonable effort to obtain facts and after meeting the requirement of paragraph (3).

See 42 U.S.C. § 11112(a), App. A-67. The statute also states that "A [peer review] action shall be presumed to have met

the preceding standards ... unless the presumption is rebutted by a preponderance of the evidence." *Id.*, App. A-67.

Following the holding of most courts that have ruled on this issue, the Nebraska Supreme Court interpreted the HCQIA to mean that expert testimony about whether the standard of care had actually been met by Dr. McLeay could not be used to rebut the statute's presumption that Bergan's decision was reasonable. *McLeay v. Bergan Mercy Health Sys. Corp.*, 714 N.W.2d 7, 17 (Neb. 2006), App. A-17. The court found the testimony of other physicians that Dr. McLeay was not negligent irrelevant because "the presumption is focused on what the review board knew when it acted." *Id.*, App. A-17. Whether or not Dr. McLeay actually met the standard of care may not be relevant to the reasonableness of the peer review board's decision at the time it acted. However, the way that experts evaluate the same evidence is relevant to at least the question of whether the "belief that the action was w..ranted" was reasonable. *See* 42 U.S.C. § 11112(a)(4), App. A-67. If such testimony is not relevant, then the court is "saying in effect that a jury could *not* reasonably arrive at the ... conclusion ... that the suspension of [plaintiff's] hospital privileges was unreasonable." *Austin v. McNamara*, 979 F.2d 728, 742 (9th Cir. 1992) (Pregerson, J., dissenting) (emphasis in original).

The Nebraska Supreme Court was wrong.[1] As the Tenth Circuit noted in *Brown v. Presbyterian Healthcare*

[1] The Nebraska Supreme Court is not alone in misinterpreting this provision of the HCQIA. *See* Sugarbaker v. SSM Health Care, 190 F.3d 905, 913 (8th Cir. 1999) ("[T]he affidavit of ... an independent surgeon [regarding] the quality of [the physician's] ... care is irrelevant to our objective inquiry."); Mathews v. Lancaster Gen. Hosp., 87 F.3d 624, 636 n.9 (3d Cir. 1996) ("While the conflicting [expert] reports raise an issue

(Continued on following page)

Servs., if "'a difference of opinion among experts' does not raise an issue as to the objective reasonableness of the inquiry" then "a peer review participant would be absolutely immune from liability for its actions so long as it produced a single expert to testify [that] the requirements of 42 U.S.C. § 11112(a) were satisfied." 101 F.3d 1324, 1334 n.9 (10th Cir. 1996). Congress could have created absolute immunity from suit if it had desired. But it did not.

When Congress passed the HCQIA, absolute immunity was specifically considered and rejected in favor of qualified immunity. The House Committee on Energy and Commerce stated that it "[i]nitially . . . considered establishing a very broad protection from suit for professional review actions." H.R. Rep. No. 99-903, at 9 (1986), *as reprinted in* 1986 U.S.C.C.A.N. 6384, 6391. However, "[i]n response to concerns that such protection might be abused and serve as a shield for anti-competitive economic actions under the guise of quality controls . . . the Committee restricted the broad protection." *Id.* As enacted, HCQIA provides only a rebuttable presumption "for proper peer review." *See id.*

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of fact as to whether [plaintiff] provided acceptable care, they do not call into question whether the [hospital's] decision . . . was reasonable."); Imperial v. Suburban Hosp. Ass'n, 37 F.3d 1026, 1030 (4th Cir. 1994) ("[E]ven if [plaintiff] could show that [the peer reviewers] reached an incorrect conclusion . . . that does not meet the burden of contradicting the existence of a reasonable belief. . . ." (emphasis omitted)); Egan v. Athol Memorial Hosp., 971 F. Supp. 37, 43 (D. Mass. 1997), *aff'd*, 134 F.3d 361 (1st Cir. 1998) ("The opinions of [plaintiff's] experts are to no avail because even if [plaintiff] could show that defendants reached an incorrect conclusion . . . 'that does not meet the burden of contradicting the existence . . . of a reasonable belief. . . . '" (emphasis omitted)); Meyer v. Sunrise Hosp., 22 P.3d 1142 (Nev. 2001) ("Expert testimony is irrelevant to our consideration of immunity. . . .").

In the majority of jurisdictions, however, the qualified immunity of the statute has been inflated into the absolute immunity Congress purposefully rejected. The Nebraska Supreme Court, among others, committed an additional error by joining one misinterpretation of the HCQIA regarding the relevancy of experts to another misinterpretation of the HCQIA affecting the summary judgment standard.

II. Summary Judgment

A conflict exists between the United States Court of Appeals for the Tenth Circuit and most other courts that have considered the issue regarding whether the HCQIA's rebuttable presumption modifies the standard to be used for granting summary judgment. The Tenth Circuit applies the familiar summary judgment standard of Fed. R. Civ. P. 56 that there be "no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *See also* Neb. Rev. Stat. § 25-1332 (2000) (same). The majority of courts, however, including the Nebraska Supreme Court below, have concluded that the HCQIA

> adds a rather unconventional twist to the burden of proof in our summary judgment standard of review. . . . [A] court must determine whether the physician satisfied his or her burden of producing evidence that would allow a reasonable jury to conclude that the hospital's peer review process failed to meet the standards of the HCQIA. . . . [T]he presumption means that the plaintiff bears the burden of proving that the review process was not reasonable.

McLeay v. Bergan Mercy Health Sys. Corp., 714 N.W.2d 7, 15 (Neb. 2006) (internal citations omitted), App. A-12.[2] Under this erroneous interpretation of the HCQIA, the burden shifts to the nonmoving party in a summary judgment proceeding. The nonmoving party must prove that the moving party failed to act reasonably. With the burden shifted to the nonmoving party, the moving party can frequently win on a motion for summary judgment without putting on any evidence at all.

This perversion of the summary judgment standard was never intended by Congress when it enacted the HCQIA. In fact, ten years before Congress passed the HCQIA, this Court explained in an analogous context that a "rebuttable presumption" should carry "no procedural consequence" under Fed. R. Civ. P. 56. *Lavine v. Milne*, 424 U.S. 577, 584 (1976). Since it is presumed that Congress is aware of the decisions of this Court, Congress must not

[2] *See also* Gordon v. Lewistown Hosp., 423 F.3d 184 (3d Cir. 2005) ("[T]his presumption of immunity creates an unusual standard for reviewing summary judgment orders. . . ."); Wieters v. Roper Hosp., Inc., 58 F. App'x 40, 45 (4th Cir. 2003) ("This [rebuttable presumption] creates an unusual summary judgment standard."); Meyers v. Columbia/HCA Healthcare Corp., 341 F.3d 461 (6th Cir. 2003) ("[T]his rebuttable presumption 'creates an unusual summary judgment standard. . . .'"); Sugarbaker v. SSM Health Care, 190 F.3d 905, 912 (8th Cir. 1999) ("The statutory presumption included in section 11112(a) adds a rather unconventional twist to the burden of proof in our summary judgment standard of review. . . ."); Benjamin v. Aroostook Med. Ctr., 937 F. Supp. 957, 973 (D. Me. 1996), *aff'd*, 113 F.3d 1 (1st Cir. 1997) ("This presumption alters the typical summary judgment scenario creating an 'unusual standard.'" (quotation omitted)); Smith v. Ricks, 31 F.3d 1478, 1485 (9th Cir. 1994) ("The rebuttable presumption 'creates a somewhat unusual standard' of review for summary judgment. . . ."); Bryan v. James E. Holmes Reg'l Med. Ctr., 33 F.3d 1318, 1333 (11th Cir. 1994) ("[T]he rebuttable presumption of HCQIA section 11112(a) creates an unusual summary judgment standard. . . .").

have intended that procedural consequences would attach to this use of a rebuttable presumption. *See Dickman v. C.I.R.*, 465 U.S. 330, 347 n.5 (1984). Although this case does not arise under the Federal Rules of Civil Procedure, there is nothing in the HCQIA or in its legislative history that manifests a Congressional intent to create a procedural consequence for state courts but not for federal courts. Therefore, the proper interpretation of the HCQIA is that it alters neither Nebraska's summary judgment standard nor Fed. R. Civ. P. 56.

CONCLUSION

Either the error in altering the summary judgment standard or the error in excluding relevant evidence from consideration alone would be enough to warrant a reversal in this case. The combination of these errors in interpreting HCQIA operate to effectively bar physicians like Dr. McLeay, who undisputedly was not negligent, incompetent, or liable for malpractice, from having their day in court when they are unfairly and unreasonably stripped of their surgical privileges by a malicious peer review board. Altering the summary judgment standard and ultimately removing "a plaintiff's claims from the jury simply because 'a difference of opinion among experts' exists would abrogate the jury's responsibility to weigh the evidence and determine the credibility of witnesses." *Brown*, 101 F.3d at 1334. When Congress passed the HCQIA it never intended this result.

Congress enacted the HCQIA to satisfy "a national need to restrict the ability of incompetent physicians to move from State to State without disclosure or discovery . . ."

believing that this problem could "be remedied through *effective professional* peer review." 42 U.S.C. § 11101(2)-(3) (2000) (emphasis added), App. A-64. The Nebraska Supreme Court failed to interpret this federal statute in light of its purpose, which is to promote peer review that is effective and professional, not to cloak the misdeeds of competitors who would maliciously ruin each others' reputations, careers, and lives behind an arbitrary, substantially unreviewable immunity provision.

For the foregoing reasons, Dr. McLeay asks that this Court grant a Writ of Certiorari.

Respectfully submitted,

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OPINION OF THE SUPREME COURT OF NEBRASKA

Case Title

JOHN F. MCLEAY, M.D., APPELLANT AND CROSS-APPELLEE,

V.

BERGAN MERCY HEALTH SYSTEMS CORP., DOING BUSINESS AS BERGAN MERCY MEDICAL CENTER, APPELLEE AND CROSS-APPELLANT.

Case Caption

MCLEAY V. BERGAN MERCY HEALTH SYS.

Filed May 19, 2006. No. S-04-117.

Appeal from the District Court for Douglas County: JOSEPH S. TROIA, Judge. On motion for rehearing, reargument granted. See 270 Neb. 693, 708 N.W.2d 592 (2005), for original opinion. Original opinion withdrawn. Affirmed in part, and in part reversed and remanded for further proceedings.

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1. **Summary Judgment.** Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.

2. **Summary Judgment: Appeal and Error.** When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court.

3. **Federal Acts: Health Care Providers: Immunity.** Immunity under the Health Care Quality Improvement Act of 1986 is a question of law that may be resolved whenever the record is sufficiently developed.

4. **Federal Acts: Health Care Providers: Presumptions: Appeal and Error.** The Health Care Quality Improvement Act of 1986 creates a presumption that a professional review action meets the standards of the act unless the presumption is rebutted by a preponderance of the evidence.

5. **Summary Judgment: Federal Acts: Health Care Providers.** When considering summary judgment based on immunity under the Health Care Quality Improvement Act of 1986, a court asks whether a reasonable jury, viewing the facts in the best light for the physician, might conclude that he or she has shown, by a preponderance of the evidence, that the hospital's actions are outside the scope of 42 U.S.C. § 11112(a) (2000).

6. **Federal Acts: Health Care Providers: Presumptions: Proof: Appeal and Error.** The presumption that a professional review action meets the standards of the Health Care Quality Improvement Act of 1986 means that the plaintiff bears the burden of proving that the review process was not reasonable.

7. **Federal Acts: Health Care Providers: Appeal and Error.** In a factual challenge to a professional review action under the Health Care Quality Improvement Act of

1986, the facts have to be so obviously mistaken or inadequate as to make reliance on them unreasonable.

8. **Federal Acts: Health Care Providers: Appeal and Error.** When reaching the determination about the reasonableness of the actions of a review board under the Health Care Quality Improvement Act of 1986, the court looks at the totality of the process leading up to the professional review action.

9. **Federal Acts: Health Care Providers: Presumptions: Appeal and Error.** A physician's showing that the standard of care was met, or that the professional review board reached the wrong conclusion, does not meet the burden of overcoming the presumption under the Health Care Quality Improvement Act of 1986 of a reasonable belief that the hospital was furthering quality health care.

10. **Federal Acts: Health Care Providers: Libel and Slander: Immunity: Damages.** A defamation action seeking damages is subject to immunity under the Health Care Quality Improvement Act of 1986.

11. **Federal Acts: Health Care Providers: Immunity: Equity.** The immunity provisions of the Health Care Quality Improvement Act of 1986 do not include actions seeking equitable relief.

12. **Appeal and Error.** An appellate court will not consider an issue on appeal that was not passed upon by the trial court.

HENDRY, C.J., CONNOLLY, GERRARD, STEPHAN, MCCORMACK, AND MILLER-LERMAN, JJ., AND HANNON, Judge, Retired.

CONNOLLY, J.

John F. McLeay, M.D., sued Bergan Mercy Health Systems Corp. (Bergan) after a peer review board suspended his privileges. The district court granted Bergan's motion for summary judgment, determining that Bergan was immune from liability under the Health Care Quality Improvement Act of 1986 (HCQIA), 42 U.S.C. § 11101 et seq. (2000). We reversed in part and affirmed in part, because Bergan failed to show that the presumption applied. *McLeay v. Bergan Mercy Health Sys.*, 270 Neb. 693, 708 N.W.2d 592 (2005). Bergan moved for rehearing, which we granted, and we ordered the appeal to be reargued.

We now withdraw our original opinion in *McLeay* and substitute this opinion in which we determine that Bergan, in its review of McLeay's performance, acted with a reasonable belief that it was promoting quality care. Therefore, McLeay's actions for damages are immune under the HCQIA. His request for reinstatement, however, is not subject to HCQIA immunity, and we remand the cause for a determination whether there is an issue of material fact, whether McLeay waived his claim for reinstatement, and whether he is entitled to reinstatement. Accordingly, we affirm in part, and in part reverse and remand for further proceedings.

BACKGROUND

Bergan suspended McLeay's surgical privileges. McLeay filed an action seeking damages and reinstatement that resulted in a jury award of $451,000. Bergan appealed. The Nebraska Court of Appeals reversed and ordered a new trial. In its opinion, the court stated that although it did not decide the issue, the facts were such

that the immunity provisions of the HCQIA were likely "implicated in a substantial way." *McLeay v. Bergan Mercy Health Sys.*, No. A-99-474, 2001 WL 185263 at *6 (Neb. App. Feb. 27, 2001) (not designated for permanent publication). McLeay then filed a new petition seeking damages and reinstatement for breach of contract, fraudulent representation, fraudulent concealment, mutual mistake, and defamation, relating to the suspension of his surgical privileges and Bergan's filing of reports to the National Practitioner Data Bank (NPDB). A portion of the defamation cause of action was dismissed based on the statute of limitations.

Bergan filed an answer alleging that McLeay waived claims by failing to exhaust administrative remedies. It also alleged that it was immune from liability for its actions under the HCQIA and moved for summary judgment.

Evidence presented at the summary judgment hearing consisted of the record from the first trial. The record shows that in 1992, McLeay was informed by letter that because of concerns about the quality of care he provided, he would be monitored during certain surgical procedures. McLeay met with an ad hoc committee and entered an agreement for monitoring. McLeay disputed some terms of the agreement, but he signed the ad hoc committee meeting minutes stating that he accepted and agreed to them.

In January 1993, McLeay's privileges were further restricted. Minutes from a meeting of the ad hoc review committee that considered the matter stated:

> The members reviewed all of the information made available to the Committee through its investigative process. It was determined significant evidence

> was present in order to justify a recommendation for action. This evidence included two concern reports from nursing staff on the floors, two concern reports from nursing staff in the Surgery department, two concern reports from Anesthesiologists, and a number of cases identified as having inappropriate or sub-standard care.

Bergan filed a report with the NPDB. McLeay filed a response stating that the report was incorrect.

In December 1993, McLeay wrote a letter requesting reinstatement and acknowledged that "1992 was an aberration of my surgical care" and stated that he had his "'wake-up call.'" Bergan denied the request.

In 1994, Bergan notified McLeay of further specific concerns, and at McLeay's request, a hearing was scheduled. Bergen informed McLeay that it was concerned about his surgical judgment or techniques in eight cases. Bergan informed McLeay of a report from a monitoring physician concerning the care of three patients, an internal medicine physician's concerns about a patient, and documentation regarding two patients. Bergan's record numbers relating to the cases were listed in a letter sent to McLeay providing notice of a hearing on the matter. McLeay stated that he did not go back to Bergan to look at the records because he believed that it would not be allowed. He also stated, however, that he did not want to go back to Bergan. Bergan's president at the time testified that McLeay was never denied access to the records and could have viewed them.

According to Bergan, McLeay did not attend the hearing. Bergan then informed him that he was suspended. McLeay stated that there was a "meeting" or

"hearing" on the matter. The record shows that McLeay was informed of his right to a hearing before the medical executive committee and that he requested one. Bergan scheduled a hearing, but then postponed it at McLeay's request, and it was never rescheduled. Bergan informed the NPDB of the suspension in a report that stated that McLeay was summarily suspended for incompetence, negligence, and malpractice. McLeay filed statements disputing the accuracy of the report and stated that it was false, but did not provide any details.

According to McLeay, the committee's actions came without warning and surprised him. He stated that before receiving the letters from the committee, Bergan had not discussed with him the issues regarding his patients. He disputes that he acted negligently or incompetently when treating patients. He contends that he was deprived of a hearing at times, but the record as a whole shows that Bergan informed him of the review committee's actions. He spoke with members of the committee on several occasions, and he was afforded an opportunity for a hearing. Yet, McLeay conceded that he understood how the peer review process worked and that he knew he was entitled to a hearing.

Dr. Dwaine J. Peetz, Jr., who was chairman of the department of surgery during the time McLeay was suspended, described the peer review process that led to the suspension. According to Peetz, the outpatient surgical advisory committee initiated the peer review process by reporting an incident involving one or two patients. Regarding the suspension, Peetz explained that a summary suspension occurs only when the hospital and physicians are concerned that harm might come to patients.

The record does not contain specific information about the cases under review because the incidents reported to the committee were viewed as confidential. Although Peetz did not provide details of the cases that led to McLeay's suspension, he stated that two cases had caused concern within a short timeframe. According to Peetz, five to seven of the eight cases listed as being problematic involved "specialties" and had "significant concerns."

Dr. Richard J. Feldhaus, who was involved in the peer review process, testified about reports concerning the care of patients and that the surgery department believed the evidence justified a review. Feldhaus also testified that he was concerned about a case and that it was one of the eight cases that were listed when McLeay's privileges were suspended.

McLeay presented deposition testimony from two physicians. Dr. Anthony Pantano, a surgeon, testified that he had assisted McLeay in surgery and was familiar with the standard of care, but did not provide details about the standard of care. Pantano was present at some of the cases used in the peer review and reviewed the file in others. He testified about seven of the eight cases and stated that McLeay acted "appropriately" and that he had no questions about McLeay's skills or judgment. He did not provide specifics about how the standard of care was met or what the standard of care was.

Dr. James A. Mailliard also testified. Mailliard did consultations with McLeay about patient care, but did not assist in surgery. Mailliard did not testify about the surgical standard of care. He did testify, however, that he reviewed the files in two of the eight cases and did not

have any concern about McLeay's judgment, skills, or technique.

The court granted Bergan's motion for summary judgment, concluding there was no issue of material fact that disputed that the peer review action was taken in the reasonable belief that it was furthering quality care. Therefore, Bergan was immune from suit under the HCQIA. The court did not fully address whether McLeay had waived his claims by failing to reschedule a hearing concerning the revocation of privileges.

ASSIGNMENTS OF ERROR

McLeay assigns, rephrased and consolidated, that the district court erred by (1) determining that Bergan was immune under the HCQIA; (2) failing to find that there were issues of material fact about the requirements to report and the falsity of the reports or malice in submitting them, which issues affected immunity; (3) failing to determine that immunity did not apply to equitable claims; and (4) determining that McLeay had waived his claims against Bergan. On cross-appeal, Bergan contends that allegations of defamation were barred by the statute of limitations.

STANDARD OF REVIEW

[1] Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Andres v. McNeil Co.*, 270 Neb. 733, 707 N.W.2d 77[illegible] (2005).

[2] When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court. *Merz v. Seeba, ante* p. 117, 710 N.W.2d 91 (2006).

ANALYSIS

IMMUNITY

McLeay argues that Bergan was not acting within the scope of the HCQIA and was not entitled to immunity under it. According to McLeay, issues of material fact exist whether Bergan acted in the reasonable belief that its actions were in the furtherance of quality care and whether there were reasonable efforts to obtain the facts. Bergan, in its answer, alleges that its actions were a part of a professional review action that is entitled to immunity under the HCQIA.

[3] Immunity under the HCQIA is a question of law that may be resolved whenever the record is sufficiently developed. See, e.g., *Bryan v. James E. Holmes Regional Medical Center*, 33 F.3d 1318 (11th Cir. 1994); *Meyer v. Sunrise Hosp.*, 117 Nev. 313, 22 P.3d 1142 (2001). " 'Congress passed the [HCQIA] to improve the quality of medical care by encouraging physicians to identify and discipline physicians who are incompetent or who engage in unprofessional behavior.' " *Lee v. Trinity Lutheran Hosp.*, 408 F.3d 1064, 1070 (8th Cir. 2005). " 'Congress believed that effective peer review would be furthered by granting limited immunity from suits for money damages to participants in professional peer review actions.' " *Id.*

> The HCQIA defines the term "professional review action" to mean an action or recommendation of a professional review body which is taken or made in the

> conduct of professional review activity, which is based on the competence or professional conduct of an individual physician (which conduct affects or could affect adversely the health or welfare of a patient or patients), and which affects (or may affect) adversely the clinical privileges . . . of the physician.

42 U.S.C. § 11151(9). Under the HCQIA, a professional review body is cloaked with immunity from suits for damages:

> If a professional review action (as defined in section 11151(9) of this title) of a professional review body meets all the standards specified in section 11112(a) of this title, except as provided in subsection (b) of this section –
>
> (A) the professional review body,
>
> (B) any person acting as a member or staff to the body,
>
> (C) any person under a contract or other formal agreement with the body, and
>
> (D) any person who participates with or assists the body with respect to the action,
>
> shall not be liable in damages under any law of the United States or of any State (or political subdivision thereof) with respect to the action.

42 U.S.C. § 11111(a)(1).

Section 11112(a) of the HCQIA sets out the immunity standards. To be immune from suits for money damages, a professional peer review action must be taken:

> (1) in the reasonable belief that the action was in the furtherance of quality health care,

> (2) after a reasonable effort to obtain the facts of the matter,
>
> (3) after adequate notice and hearing procedures are afforded to the physician involved or after such other procedures as are fair to the physician under the circumstances, and
>
> (4) in the reasonable belief that the action was warranted by the facts known after such reasonable effort to obtain facts and after meeting the requirement of paragraph (3).

[4] Further, the HCQIA creates a presumption that a professional review action meets the standards of the act "unless the presumption is rebutted by a preponderance of the evidence." § 11112(a). Accord *Sugarbaker v. SSM Health Care*, 190 F.3d 905 (8th Cir. 1999). See *Lee, supra.* Courts agree that the reasonableness requirements contained in § 11112(a) necessitate an objective inquiry. See, e.g., *Sugarbaker, supra.*

[5] When discussing the presumption, courts have repeatedly commented on the interplay of the presumption and the summary judgment standard. Thus, courts have stated:

> "The statutory presumption included in section 11112(a) adds a rather unconventional twist to the burden of proof in our summary judgment standard of review, but the determination of whether a given factual dispute requires submission to a jury must be guided by the substantive evidentiary standards that apply to the case."

Lee v. Trinity Lutheran Hosp., 408 F.3d 1064, 1070 (8th Cir. 2005). Therefore, the courts ask, " 'Might a reasonable jury, viewing the facts in the best light for [the physician],

conclude that [he or she] has shown, by a preponderance of the evidence, that [the hospital's] actions are outside the scope of [§ 1]1112(a)?'" *Lee*, 408 F.3d at 1070-71.

[6] Stated differently, a court must determine whether the physician satisfied his or her burden of producing evidence that would allow a reasonable jury to conclude that the hospital's peer review process failed to meet the standards of the HCQIA. *Lee, supra.* See, *Brader v. Allegheny General Hosp.*, 167 F.3d 832 (3d Cir. 1999); *Austin v. McNamara*, 979 F.2d 728 (9th Cir. 1992); *Fox v. Parma Community Gen. Hosp.*, 160 Ohio App.3d 409, 827 N.E.2d 787 (2005); *Manzetti v. Mercy Hosp. of Pittsburgh*, 741 A.2d 827 (Pa. Commw. 1999). The Nebraska Court of Appeals has addressed the matter, noting that the presumption means that the plaintiff bears the burden of proving that the review process was not reasonable. See, *Babcock v. Saint Francis Med. Ctr.*, 4 Neb.App. 362, 543 N.W.2d 749 (1996), citing *Bryan v. James E. Holmes Regional Medical Center*, 33 F.3d 1318 (11th Cir. 1994).

Here, McLeay argues that Bergan failed to present evidence that it was entitled to immunity. According to McLeay, Bergan failed to show any evidence of how McLeay failed to perform adequately and, thus, failed to meet an initial burden to show that the committee acted reasonably. McLeay also distinguishes the case law by pointing out that in most cases applying the presumption, the record contains detailed facts about the physician's errors or incompetence, while here, the record reflects no such details.

McLeay's argument fails for several reasons. First, the parties do not dispute that a peer review process was at issue. Under § 11112(a), once a peer review process is at

issue, those participating in the process are presumed to be immune from damages unless the plaintiff overcomes the presumption by showing that the factors in § 11112(a)(1) to (4) were not met. In addition, the plaintiff carries the burden of showing by a preponderance of the evidence that the peer review process was not reasonable.

Therefore, for Bergan to initially raise the issue that it was immune from liability, it would simply need to show that the dispute arose out of a professional review action. Issues concerning Bergan's reasonable belief that it was acting to further quality care and the other factors in § 11122(a)(1) to (4) are expressly presumed under the HCQIA.

That a professional review action was at play is undisputed. Accordingly, Bergan was presumed to be immune from actions for damages under the HCQIA unless McLeay satisfied his burden of producing evidence to allow a reasonable jury to conclude that the peer review process failed to meet the provisions of the HCQIA. See, e.g., *Lee, supra.*

MCLEAY'S EVIDENCE TO REBUT PRESUMPTION

We next address whether McLeay presented evidence to rebut the presumption that would make summary judgment inappropriate.

[7,8] One court described a factual challenge to the professional review action, stating that the facts would have to be "'so obviously mistaken or inadequate as to make reliance on them unreasonable.'" *Meyers v. Columbia/HCA Healthcare Corp.*, 341 F.3d 461, 471 (6th Cir. 2003). Also, when reaching the determination, the court

looks at the totality of the process leading up to the professional review action. *Joshi v. St. Luke's Episcopal*, 142 S.W.3d 862 (Mo. App. 2004).

Although McLeay alleges that he was not afforded adequate notice and hearing, the record does not support that assertion. Nor is there a meaningful dispute about a reasonable effort to obtain facts in the matter. Thus, we focus on the reasonable belief that the action was in the furtherance of quality care. McLeay contends that the testimonies of Pantano and Mailliard show that he acted competently and thus raise an issue of material fact whether Bergan had a reasonable belief that it was acting in the furtherance of quality care. He also argues the record reflects very little evidence about the eight cases that led to the termination of his privileges.

[9] McLeay's argument falls short. Courts have overwhelmingly held that a physician's showing that the standard of care was met, or that the professional review board reached the wrong conclusion, does not meet the burden of overcoming the presumption of a reasonable belief that the hospital was furthering quality health care. See, *Lee v. Trinity Lutheran Hosp.*, 408 F.3d 1064 (8th Cir. 2005); *Meyers, supra; Brader v. Allegheny General Hosp.*, 167 F.3d 832 (3d Cir. 1999). The focus is on whether the hospital acted in a reasonable belief that it was furthering quality health care, with the information available to the professional review board when it acted, and if the reviewers would have reasonably concluded that their actions would restrict incompetent behavior or protect patients at that time. See, generally, *id.*

Only one court has held that expert testimony about the standard of care could be used to rebut the presumption.

Brown v. Presbyterian Healthcare Services, 101 F.3d 1324 (10th Cir. 1996). There, the expert testified not only about the standard of care, but stated that the review panel reviewed only two charts before revoking privileges, which was unreasonably narrow at that time. *Brown* has been distinguished by other courts because of its unique facts that focus on the information available to the review board. See, e.g., *Manzetti v. Mercy Hosp. of Pittsburgh*, 741 A.2d 827 (Pa. Commw. 1999). One court that distinguished *Brown* described it as follows:

> While *Brown* does discuss the use of expert testimony in evaluating issues of immunity under HCQIA, the decision in *Brown* centered upon the fact that Dr. [Arlene] Brown was able to produce significant evidence to support her allegations that information submitted by the defendants in her medical review process was false or misleading. Indeed, Dr. Brown produced evidence that the individuals who investigated her actions were involved in encouraging another doctor to move his practice so as to be in direct competition with her. In other words, the defendants in *Brown* had conspired to manufacture allegations of improper behavior by Dr. Brown so as to put Dr. Brown out of business. In this setting, Dr. Brown's expert concluded that the defendants were not acting to further quality health care. Neither were their actions reasonable under the facts of the case. It was for this reason that the federal district court in *Brown* refused to grant summary judgment on the basis of HCQIA immunity, a decision that was affirmed by the United States Court of Appeals for the Tenth Circuit.

Meyer v. Sunrise Hosp., 117 Nev. 313, 324, 22 P.3d 1142, 1150 (2001). Instead of applying *Brown*, the *Meyer* court stated: "Expert testimony is irrelevant to our consideration of immunity under HCQIA because we focus solely on

the reasonableness of the peer reviewer's belief, not on whether the peer review action ultimately proved to be medically sound or actually furthered quality care." 117 Nev. at 323, 22 P.3d at 1149, citing *Sugarbaker v. SSM Health Care*, 190 F.3d 905 (8th Cir. 1999), and *Manzetti, supra.*

Although *Brown* allowed the use of expert testimony, that case also involved the use of experts to testify about the review process itself. *Brown, supra.* In cases involving the use of expert testimony after the fact to show that the standard of care was actually met, courts uniformly hold that the testimony will not rebut the presumption. See, e.g., *Lee, supra; Brader, supra; Mathews v. Lancaster General Hosp.*, 87 F.3d 624 (3d Cir. 1996); *Manzetti, supra.*

Here, Pantano's and Mailliard's testimonies cannot rebut the presumption. The presumption is focused on what the review board knew when it acted. Therefore, later expert testimony that McLeay acted appropriately in the cases reviewed cannot be used to rebut the presumption.

Although the record is sparse on details of the eight cases reviewed, McLeay signed his agreement to the meeting minutes of the committee when it imposed monitoring. When the committee later imposed further restrictions, it reviewed the cases, including two reports from nursing staff on the floors, two reports from nursing staff in the surgery department, two reports from anesthesiologists, and a number of cases identified as having substandard care. In a letter, McLeay acknowledged that "1992 was an aberration of my surgical care" and stated that he had his "'wake-up call.'" When McLeay's privileges were suspended, Bergan stated that it was troubled by the eight

cases. In addition, Peetz testified that several cases were close together in time and that a suspension would not occur unless the review board believed that harm might come to patients. Finally, Feldhaus testified that he personally was concerned about one of the eight cases that were listed when McLeay's privileges were suspended.

Although the evidence is not overwhelming as to the specific details of the cases reviewed, the record shows that a review was justified, and McLeay failed to present evidence to overcome the presumption to show that Bergan reasonably believed that it was acting in the furtherance of quality care. Accordingly, McLeay failed to meet his burden to present evidence that would allow a reasonable jury to conclude that Bergan's peer review process failed to meet the standards of the HCQIA.

FALSE REPORTS

McLeay argues that no immunity exists for false databank reports when made with the knowledge they are false. He argues that Bergan never made a finding that he was incompetent or negligent or that he had committed malpractice, and he contends the evidence shows that Bergan knew the NPDB reports were false.

As previously discussed, all actions for damages are subject to immunity under the HCQIA. Section 11137(c), however, provides: "No person or entity . . . shall be held liable in any civil action with respect to any report made under this subchapter . . . without knowledge of the falsity of the information contained in the report." Reporting of peer review actions is mandated by the HCQIA.

[10] Here, McLeay sought damages for several causes of action, including defamation. A defamation action seeking damages is subject to HCQIA immunity. See, generally, *Lee v. Trinity Lutheran Hosp.*, 408 F.3d 1064 (8th Cir. 2005); *Bryan v. James E. Holmes Regional Medical Center*, 33 F.3d 1318 (11th Cir. 1994). The record shows that the Bergan representative who filed the reports lacked personal knowledge of their accuracy and was relying on the actions of the review board and reporting its findings. Nor does the record indicate knowledge by Bergan that the reports were false. They simply reported the findings of the committee. See *Odom v. Fairbanks Memorial Hosp.*, 999 P.2d 123 (Alaska 2000).

We determine that McLeay's claims about false reporting are subject to the immunity provisions of the HCQIA and that McLeay failed to present evidence sufficient to overcome the presumption for summary judgment.

EQUITABLE CLAIMS AND WAIVER

McLeay argues that his claims for equitable relief are not subject to immunity under the HCQIA. For example, in his petition, McLeay sought reinstatement of his privileges.

[11] A few cases have applied HCQIA immunity to claims seeking reinstatement without analyzing the issue. See, e.g., *Meyers v. Columbia/HCA Healthcare Corp.*, 341 F.3d 461 (6th Cir. 2003). The HCQIA, however, specifically states that it applies to suits for money damages. See § 11111. It does not include actions seeking equitable relief. See, *Babcock v. Saint Francis Med. Ctr.*, 4 Neb.App. 373, 543 N.W.2d 749 (1996); *Lipson v. Anesthesia Services, P.A.*, 790 A.2d 1261 n. 14 (Del. Super. 2001). See, generally,

Sugarbaker v. SSM Health Care, 190 F.3d 905 (8th Cir. 1999). Here, McLeay, in addition to seeking damages, also sought reinstatement of his privileges as a remedy. To the extent he sought equitable relief that did not involve an award of damages, those remedies are not subject to HCQIA immunity.

Bergan, however, argues that McLeay waived his claims because he failed to exhaust administrative remedies when he did not reschedule the hearing before the medical executive committee. In the alternative, it contends that the primary jurisdiction doctrine applies.

The district court analyzed the waiver issue only in determining that McLeay's false reporting claims were immune under the HCQIA. Because the court determined that Bergan was immune from liability under all of McLeay's claims, it did not specifically reach the waiver issue on the remaining claims, examine the record for issues of material fact concerning waiver of claims, or consider the legal arguments presented concerning waiver.

[12] Because the district court did not consider whether McLeay waived his equitable claims, we do not consider the issue. An appellate court will not consider an issue on appeal that was not passed upon by the trial court. See *In re Guardianship & Conservatorship of Larson*, 270 Neb. 837, 708 N.W.2d 262 (2006). Accordingly, we reverse, and remand for further proceedings to determine whether McLeay is entitled to equitable remedies.

CONCLUSION

We determine that Bergan was immune from liability for damages on all of McLeay's causes of action because it

undertook a peer review action and McLeay failed to rebut the presumption that the review committee acted reasonably. Accordingly, we affirm the district court's grant of summary judgment on claims for damages. We also determine, however, that McLeay's claims for equitable relief are not subject to HCQIA immunity, and he may be able to proceed on those claims if they were not waived. Because the district court did not pass on that topic, we reverse the summary judgment to the extent it affects claims for equitable relief and remand the cause for further proceedings. Because we conclude that Bergan was immune from McLeay's defamation claims for damages, we do not discuss Bergan's cross-appeal.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

WRIGHT, J., not participating.

NEBRASKA SUPREME COURT
AND NEBRASKA COURT OF APPEALS
OFFICE OF THE CLERK
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February 23, 2006

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IN CASE OF: S-04-000117, McLeay v. Bergan Mercy Health Systems Corp.

The following internal procedural submission or filing by a party:

Appellee/Motion for Rehearing
submitted or filed 12/19/05

has been reviewed by the court and the following order entered:

Motion of appellee for rehearing sustained. Matter to be reargued to the Supreme Court during its April session.

Respectfully,

CLERK OF THE SUPREME COURT
AND COURT OF APPEALS

708 N.W.2d 592

OPINION OF THE SUPREME COURT OF NEBRASKA

Case Title

JOHN F. MCLEAY, M.D.,
APPELLANT AND CROSS-APPELLEE,
V.
BERGAN MERCY HEALTH SYSTEMS CORP.,
DOING BUSINESS AS BERGAN MERCY MEDICAL CENTER,
APPELLEE AND CROSS-APPELLANT.

Case Caption

MCLEAY V. BERGAN MERCY HEALTH SYS.

Filed December 9, 2005 No. S-04-117.

Appeal from the District Court for Douglas County: JOSEPH S. TROIA, Judge. Affirmed in part, and in part reversed and remanded for further proceedings.

David S. Houghton and J.P. Sam King, of Lieben, Whitted, Houghton, Slowiaczek & Cavanagh, P.C., L.L.O., for appellant.

P. Shawn McCann, of Sodoro, Daly & Sodoro, P.C., for appellee.

1. **Summary Judgment.** Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.

2. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against

whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.

3. **Federal Acts: Health Care Providers: Immunity.** Whether an entity or individual is entitled to Health Care Quality Improvement Act of 1986 immunity is a question of law for the court to decide and may be resolved whenever the record becomes sufficiently developed.

4. **Appeal and Error.** An appellate court is not obligated to engage in an analysis which is not needed to adjudicate the controversy before it.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, AND MILLER-LERMAN, JJ.

MCCORMACK, J.

I. NATURE OF CASE

In this appeal, John F. McLeay, M.D., challenges certain actions taken against him by Bergan Mercy Health Systems Corp. (Bergan) preceding Bergan's suspension of McLeay's surgical privileges. The district court granted summary judgment in favor of Bergan, finding that Bergan was immune from liability for damages under the Health Care Quality Improvement Act of 1986 (HCQIA), 42 U.S.C. § 11101 et seq. (2000). McLeay appeals, and Bergan cross-appeals.

II. FACTUAL BACKGROUND

McLeay is a general surgeon in Omaha, where he has been a solo practitioner since 1963. He has also been a member of the medical staff at Bergan since that year. At

all relevant times, McLeay had general surgical privileges at both Bergan and St. Joseph Hospital.

On or about October 19, 1992, McLeay received a certified letter from Bergan. The letter informed McLeay that an investigation into the medical care he had provided to patients at Bergan had been authorized by a surgery advisory committee. It further stated that "[i]f the peer review process ends with a recommendation that would adversely effect your clinical privileges or Staff membership, you will be notified of such recommendations and given notice of your right to a hearing in accordance with the Medical Center's Fair Hearing Plan."

McLeay was next informed about the investigation in a December 2, 1992, letter from Richard Hachten, the president of Bergan. McLeay was informed that a monitoring requirement was immediately being imposed upon his surgical privileges per the recommendation of the medical executive committee. This monitoring required that another surgeon attend any surgical procedure performed by McLeay. The letter further stated that the "monitoring requirement will remain in effect until the corrective action procedure, of which you were previously notified, has been completed in accordance" with Bergan's bylaws. It also stated that McLeay would have an opportunity to meet with an ad hoc review committee investigating the clinical care provided to his patients.

The first communication McLeay received from the ad hoc committee came in a December 23, 1992, letter. The letter invited McLeay to attend a meeting of the ad hoc committee on December 29. The letter informed McLeay that at the meeting, he would be "informed of the general nature of the information and will be given an opportunity

to discuss it with the Committee." The letter also stated that "[t]he meeting is informal. It is not a hearing and none of the rules concerning hearings outlined in the Bylaws apply to this meeting."

Present at the December 29, 1992, meeting were Drs. Dwaine Peetz and Daniel McKinney. The third member of the committee, Dr. Richard Feldhaus, was not present. At the meeting, McLeay first became aware of the subject of the investigation-medical care he had previously provided to eight patients (the eight cases). The committee asked McLeay about the care he provided in the eight cases, and McLeay was able to review some records from the eight cases.

McLeay next heard from the ad hoc committee when Peetz telephoned him on January 7, 1993, and asked McLeay to meet with the committee the next day. At the meeting, they discussed the eight cases and the monitoring requirement. McLeay was also given a list of five minor procedures that he could perform without a monitor. According to McLeay, the committee also agreed to later provide a "laundry list" of outpatient surgical procedures that would also be exempted from the monitoring requirement. Several months later, Hachten informed McLeay that his request to receive a "laundry list" of exempted procedures had been denied.

McLeay testified that he was told by the ad hoc committee that the monitoring requirement would be in effect for 6 to 12 months, after which time, McLeay could apply for reinstatement. Minutes of the January 7, 1993, meeting stated that the minutes were privileged communications and not subject to disclosure under Nebraska law. The minutes memorialized the monitoring requirement and also

stated that McLeay would be removed from the call list for the emergency medicine department. The minutes were signed by McLeay.

The matter then went to the medical executive committee. The medical executive committee approved the monitoring requirement and four minor procedures excluded from the monitoring requirement. The minutes of the medical executive committee were signed by McLeay. Bergan's board of directors approved the agreement between McLeay and the ad hoc committee, as supplemented by the medical executive committee.

On February 26, 1993, McLeay received a letter from Bergan. It informed McLeay that the hospital had submitted a report to the "National Practitioner Data Bank" (databank). McLeay testified that prior to receiving this letter, the databank had never been raised as a topic in any of his discussions with the hospital. The report submitted to the databank indicated that a monitoring requirement had been imposed on McLeay's surgical procedures. The report indicated that the duration of the action taken by Bergan was indefinite and constituted a reduction of clinical privileges for "Incompetence/Malpractice/Negligence."

On December 2, 1993, 1 year after the monitoring requirement had been imposed on his surgical procedures, McLeay sent a letter to Peetz requesting reinstatement. On June 1, 1994, McLeay was informed that Bergan's board of directors decided not to remove the monitoring requirement but did direct that criteria be established so that McLeay could work toward removing the monitoring requirement. McLeay was never notified of any such criteria.

During the afternoon of December 9, 1994, McLeay received a telephone call from Feldhaus saying that Feldhaus and Hachten wanted to meet with McLeay that afternoon and talk about McLeay's privileges. McLeay insisted on having counsel present at the meeting. Five minutes later, Hachten telephoned McLeay and told him that his privileges at Bergan were being suspended because of additional information regarding McLeay's care of a patient in July 1991.

On December 13, 1994, McLeay received a letter from Hachten. As reasons for the suspension, the letter mentioned the eight cases as well as several new cases McLeay had never previously heard concerns about. On February 8, 1995, Bergan reported McLeay's suspension to the databank, again indicating that it was for "Incompetence/Malpractice/Negligence" and for an indefinite duration.

III. PROCEDURAL BACKGROUND

McLeay initially filed a petition against Bergan on January 6, 1995. A jury trial was held in November 1998. The jury was instructed on two counts: breach of contract and breach of Bergan's bylaws. The jury returned a verdict in favor of McLeay in the amount of $451,000 on the breach of contract claim and $1 on the breach of bylaws claim. Bergan appealed the verdict to the Nebraska Court of Appeals, which vacated the verdict, reversed the judgment, and remanded the cause because of the erroneous admission of expert testimony. *McLeay v. Bergan Mercy Health Sys.*, No. A-99-474, 2001 WL 185263 (Neb. App. Feb. 27, 2001) (not designated for permanent publication).

On remand, McLeay filed the operative petition against Bergan on May 22, 2002. It included separate causes of

action for breach of contract, fraudulent representation, fraudulent concealment, negligent misrepresentation, and mutual mistake. It also included, for the first time, a claim for defamation. More specifically as it relates to his defamation claim, McLeay alleged two separate instances of defamatory statements made by Bergan: the report filed with the databank on February 22, 1993, and the report filed with the databank on February 8, 1995.

Bergan demurred to the petition, asserting, among other things, that McLeay's defamation claim was barred by the statute of limitations. The district court sustained the demurrer as to the 1993 databank report, but overruled the demurrer as to the 1995 databank report.

Each party filed a motion for summary judgment. At the summary judgment hearing, the entire record from the 1998 jury trial was received into evidence. The district court sustained Bergan's motion for summary judgment and denied McLeay's motion for summary judgment, finding that Bergan was immune from any liability for damages under the HCQIA. McLeay appeals, and Bergan cross-appeals. We moved the case to our docket.

IV. ASSIGNMENTS OF ERROR

McLeay assigns that the district court erred in (1) finding that Bergan was entitled to immunity under HCQIA; (2) finding that McLeay waived his claims against Bergan; (3) failing to find that Bergan's reports to the databank were false and that therefore, Bergan was not entitled to immunity under HCQIA; (4) determining as a matter of law that Bergan was required to report the monitoring requirement to the databank; (5) finding that there was no evidence of malice regarding Bergan's submission of

its second report to the databank; and (6) failing to find that Bergan was not immune under HCQIA from McLeay's claims for equitable relief.

On cross-appeal, Bergan assigns that the district court erred in overruling its demurrer and summary judgment motion on the February 8, 1995, report to the databank on the ground that this defamation claim was barred by the statute of limitations.

V. STANDARD OF REVIEW

Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Hans v. Lucas, ante* p. 421, 703 N.W.2d 880 (2005); *Eicher v. Mid America Fin. Invest. Corp., ante* p. 370, 702 N.W.2d 792 (2005).

In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence. *Spear T Ranch v. Nebraska Dept. of Nat. Resources, ante* p. 130, 699 N.W.2d 379 (2005); *Fraternal Order of Police v. County of Douglas, ante* p. 118, 699 N.W.2d 820 (2005).

VI. ANALYSIS

1. HCQIA Immunity With Regard to Peer Review Process

In his first assignment of error, McLeay claims that the district court erred in granting summary judgment in favor of Bergan because Bergan was entitled to immunity under HCQIA. We agree.

HCQIA was enacted to "'encourag[e] physicians to identify and discipline other physicians who are incompetent or who engage in unprofessional behavior.'" *Bryan v. James E. Holmes Regional Medical Center,* 33 F.3d 1318, 1321 (11th Cir. 1994). The process by which physicians and hospitals evaluate and discipline staff doctors is the peer review process. In furtherance of its purpose, HCQIA grants limited immunity in suits brought by disciplined physicians from liability for money damages to those who participate in professional peer review actions, as that term is defined in HCQIA. 42 U.S.C. § 11111(a). Whether an entity or individual is entitled to HCQIA immunity is a question of law for the court to decide and may be resolved whenever the record becomes sufficiently developed. See *id.*

To avail itself of the immunity granted by HCQIA, the professional review action by a professional review body must be taken:

> (1) in the reasonable belief that the action was in the furtherance of quality health care,
>
> (2) after a reasonable effort to obtain the facts of the matter,
>
> (3) after adequate notice and hearing procedures are afforded to the physician involved or

> after such other procedures as are fair to the physician under the circumstances, and
>
> (4) in the reasonable belief that the action was warranted by the facts known after such reasonable effort to obtain facts and after meeting the requirement of paragraph (3).

42 U.S.C. § 11112(a).

A professional review action is defined in HCQIA as

> an action or recommendation of a professional review body which is taken or made in the conduct of professional review activity, which is based on the competence or professional conduct of an individual physician (which conduct affects or could affect adversely the health or welfare of a patient or patients), and which affects (or may affect) adversely the clinical privileges . . . of the physician.

42 U.S.C. § 11151(9). The monitoring requirement imposed on McLeay falls within this definition. Likewise, there is no dispute that Bergan is a "professional review body," as that term is defined in § 11151(11).

As explained by both the 9th and 11th Circuit Courts of Appeals, HCQIA reverses the normal burden of proof and establishes a presumption that the professional review action has met the four standards of § 11112(a) unless the presumption is rebutted by a preponderance of the evidence. "In a sense, the presumption language in HCQIA means that the *plaintiff* bears the burden of proving that the peer review process was *not* reasonable." (Emphasis in original.) *Bryan v. James E. Holmes Regional Medical Center,* 33 F.3d at 1333. Thus, we must consider in the instant case whether McLeay "'provided

sufficient evidence to permit a jury to find that he ha[d] overcome, by a preponderance of the evidence, the presumption'" that Bergan "'would reasonably have believed' that it had met the standards of section 11112(a)." See *Bryan v. James E. Holmes Regional Medical Center,* 33 F.3d 1318, 1334 (11th Cir. 1994). Accord *Austin v. McNamara,* 979 F.2d 728 (9th Cir. 1992). If not, Bergan's motion for summary judgment was properly granted.

Section 11112(a)(1) of the HCQIA immunity test is satisfied if " 'the reviewers, with the information available to them at the time of the professional review action, would reasonably have concluded that their action would restrict incompetent behavior or would protect patients.'" *Bryan v. James E. Holmes Regional Medical Center,* 33 F.3d at 1334-35.

McLeay offered the deposition testimony of Drs. Anthony Pantano and James Mailliard. Each doctor either reviewed the medical files for the eight cases that instigated the investigation into McLeay's surgical procedures or assisted McLeay during his care of those patients. Each testified that the care provided by McLeay was consistent with the appropriate standards of care and that McLeay did nothing that would merit any disciplinary action taken against him.

Viewing this evidence in the light most favorable to McLeay and giving McLeay the benefit of all reasonable inferences, we conclude that there is a genuine issue of material fact as to whether Bergan imposed the monitoring requirement in the reasonable belief that it was in furtherance of quality health care. The record is entirely silent on the reasonable belief which formed the basis for imposing the monitoring requirement. Although the record

indicates that an investigation was initiated because of concerns regarding the care McLeay provided in the eight cases, it fails to indicate how McLeay's performance was deficient or what allegations were made against him. Thus, there is nothing in the record to establish that Bergan had a reasonable belief the monitoring requirement would further quality health care in light of the contrary testimony of Pantano and Mailliard.

Having determined that there is an issue of material fact as to whether Bergan's actions satisfied the first requirement of § 11112(a), we need not determine whether McLeay met his burden with regard to the remaining requirements of that section. Because a question of fact exists with regard to the first requirement of § 11112(a), we conclude that the district court erred in granting summary judgment in favor of Bergan on the issue of Bergan's immunity under that section.

2. DATABANK REPORTS

McLeay's third through sixth causes of action relate to Bergan's 1993 and 1995 reports to the databank.

(A) 1993 Databank Report

Pursuant to 42 U.S.C. § 11133(a)(1), "Each health care entity which-(A) takes a professional review action that adversely affects the clinical privileges of a physician for a period longer than 30 days . . . shall report to the Board of Medical Examiners, in accordance with section 11134(a) of this title, the information described in paragraph (3)." Immunity for submitting reports to the databank under § 11134 is provided for in § 11137(c), which provides: "No person or entity . . . shall be held liable in any civil action

with respect to any report made under this subchapter (including information provided under subsection (a) of this section[)] without knowledge of the falsity of the information contained in the report."

As we stated above, the monitoring requirement imposed on McLeay's surgical procedures in December 1992 was a professional review action, which is defined in part as an action that adversely affects a physician's clinical privileges. See § 11151(9). Thus, under § 11133(a), Bergan was required to report the monitoring requirement to the databank.

The district court, with regard to the 1993 report to the databank, determined that any claims in regard to this report were barred by the statute of limitations. Although McLeay's assignments of error with regard to the 1993 report do not directly address the district court's ruling on this report, we will determine whether the granting of that demurrer was correct prior to addressing McLeay's assignments of error. The 1993 report was filed on February 22, 1993. The first claim made by McLeay in regard to this report was asserted in his amended petition filed 9 years later on May 22, 2002. The statute of limitations as set forth in Neb. Rev. Stat. § 25-208 (Cum. Supp. 2004) is 2 years. As such, the district court was correct in sustaining Bergan's demurrer to McLeay's causes of action relating to the 1993 report to the databank. It is not necessary, therefore, to address McLeay's assignments of error in this regard. An appellate court is not obligated to engage in an analysis which is not needed to adjudicate the controversy before it. *Gary's Implement v. Bridgeport Tractor Parts, ante* p. 286, 702 N.W.2d 355 (2005).

(b) 1995 Databank Report

We next address Bergan's claim on cross-appeal that the district court erred in failing to grant Bergan's demurrer and motion for summary judgment of McLeay's defamation cause of action, based on Bergan's filing of an allegedly false report to the databank on February 8, 1995. McLeay asserts that this claim, filed for the first time in his amended petition in May 2002, relates back to the original petition, which was filed in January 1995. We note that the facts giving rise to this claim occurred after the filing of the original petition. The record does not reveal that there was any claim made for any defamation prior to the May 2002 amended petition. Thus, the issue presented is whether a claim can relate back to a petition which predates the action or actions giving rise to the claim. We have not previously addressed this.

In *Gelbard v. Bodary,* 270 A.D.2d 866, 706 N.Y.S.2d 801 (2000), a physician brought a defamation action against a member of the peer review committee of the hospital where the physician's staff privileges were revoked. The *Gelbard* court held that to the extent a peer review committee member's statement to the hospital's ad hoc review committee allegedly contained new and distinct slander, a claim based on those statements did not relate back to the original complaint for statute of limitations purposes, because the original complaint did not give notice of the transaction or occurrence or series of transactions or occurrences to be proved pursuant to a new slander claim.

In *Hill v. Heritage Resources, Inc.,* 964 S.W.2d 89 (Tex. App. 1997), the Texas Court of Appeals held that claims in an oil and gas operator's amended petition for tortious

interference with a prospective business relationship and slander of title respecting the operator's alleged transactions with third parties to sell oil and gas did not exist when the operator filed the original petition. Thus, the claims did not relate back to the date of the original petition for limitations purposes in an action against working interest owners where the operator filed the original petition before the transactions came into existence.

Similarly, in *Fikes v. Furst,* 133 N.M. 146, 61 P.3d 855 (N.M. App. 2002), *reversed in part on other grounds* 134 N.M. 602, 81 P.3d 545 (2003), a defamation action brought by a professor against another professor, the New Mexico Court of Appeals held that an amended complaint did not relate back to the date the original complaint was filed for statute of limitations purposes where the amended complaint cited facts, conduct, and injuries not alleged in the original complaint. In *Fikes,* the original complaint set forth the following alleged defamatory statements: The plaintiff was not qualified to work on a certain research project, the university where the plaintiff had earned his doctoral degree had "'disowned'" the plaintiff, the university "'didn't want anything to do with him,'" and the university was "'sorry [it] had ever given him or provided him with a doctor's degree.'" 133 N.M. at 156, 61 P.3d at 865. The subsequent defamatory statements, which the plaintiff claimed related back to the original complaint, were that the plaintiff was a "'lousy anthropologist,'" that he was "'incapable of doing a competent job on [a certain] manuscript,'" that he was "'paranoid,'" that he committed unethical and professional misconduct, and that he was racist. *Id.* at 151, 61 P.3d at 860.

We agree with the decisions of these courts and likewise conclude that because the alleged defamation regarding the 1995 report by Bergan to the databank occurred after the original petition was filed, the claim could not relate back to that petition. Since the claim could not relate back to the original petition, the claim with regard to the report to the databank of February 8, 1995, was first raised in the amended petition filed May 22, 2002. As such, the claim is barred by the statute of limitations. See § 25-208. The district court, therefore, erred in not granting Bergan's demurrer to that portion of the amended petition claiming defamation as a result of Bergan's 1995 report to the databank.

3. WAIVER

In his second assignment of error, McLeay argues that the district court erred in finding that he had waived his claims against Bergan. In its December 24, 2003, order, the district court found that at the time McLeay's clinical privileges were suspended, he received notice of the reasons and was given an opportunity to be heard and have a hearing. McLeay requested a hearing, and the hearing was set for March 9, 1994. McLeay subsequently requested that the hearing be postponed, and it was never rescheduled. Pursuant to *Babcock v. Saint Francis Med. Ctr.*, 4 Neb. App. 362, 543 N.W.2d 749 (1996), the physician waives the requirement that the enumerated conditions under § 11112(b) be followed if the physician fails to object to the notice of hearing procedures. The district court did not make any finding as to the effect of the failure to reschedule the hearing.

The district court found that McLeay "voluntarily and without objection agreed to the recommendations of the ad hoc committee." McLeay claims the recommendation of the ad hoc committee was on the condition that he was to receive a "laundry list" of exempted procedures which he could perform and that the monitoring requirement would be in effect only for 6 to 12 months. Since there is a factual dispute as to what McLeay agreed to with regard to the ad hoc committee recommendation, there is a genuine issue of material fact which precludes summary judgment on the waiver issue.

VII. CONCLUSION

We conclude that the district court erred in determining that Bergan was entitled to immunity under HCQIA and in granting summary judgment in favor of Bergan. Because there remain disputed issues of fact concerning HCQIA immunity, we remand the cause to the district court for further proceedings. However, because the issue of immunity is a question of law, "[u]nder no circumstances should the ultimate question of whether the defendant is immune from monetary liability under HCQIA be submitted to the jury." See *Bryan v. James E. Holmes Regional Medical Center,* 33 F.3d 1318, 1333 (11th Cir. 1994). If the cause proceeds to trial and a jury returns a verdict awarding damages to McLeay but the evidence conclusively demonstrates that Bergan satisfied HCQIA standards for peer review procedures, then the court should grant posttrial judgment as a matter of law upon a proper motion. See *Bryan v. James E. Holmes Regional Medical Center, supra.*

We further conclude that the district court correctly sustained Bergan's demurrer on McLeay's claims relating to the 1993 report of McLeay's monitoring requirement to the databank. We also conclude that the district court erred in failing to grant Bergan's demurrer to that portion of the amended petition claiming defamation relating to the 1995 report to the databank, and we remand the cause to the district court with instructions to sustain Bergan's demurrer relating to the 1995 report to the databank.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

GERRARD, J., concurs in the result.

IN THE DISTRICT COURT OF DOUGLAS COUNTY, NEBRASKA

JOHN F. MCLEAY, M.D.,	)	**DOC. 934 NO. 716**
Plaintiff,	)	
	)	
vs.	)	**FINDING AND ORDER**
BERGAN MERCY HEALTH SYSTEMS CORP. d/b/a BERGAN MERCY MEDICAL CENTER,	)	
Defendant.	)	

THIS MATTER came before the Court on the 25th day of March, 2003 and on the 4th day of August, 2003 on the Motions for Summary Judgment of Defendant and Plaintiff. Plaintiff was represented by David S. Houghton. Defendant was represented by P. Shawn McCann. After receiving exhibits into evidence, the Court took the motions under advisement pending the submission of written arguments.

Plaintiff, John F. McLeay, M.D., is a doctor who had hospital privileges at Defendant's hospital and was a member of its medical staff. In 1992 the Plaintiff was advised that the Defendant had concerns over the quality of care several of his patients received and the hospital was going to monitor his work and impose certain restrictions. (Trial Exhibit 4). Plaintiff met with an ad hoc committee on December 29, 1992 and an agreement was entered into whereby Plaintiff would be monitored for 6 to 12 months, that the agreement would be confidential, and he would be given a "laundry list" of minor surgical procedures where a monitor wouldn't be necessary.

Plaintiff met again with the ad hoc committee on January 8, 1993 at which time the committee decided to restrict Plaintiff's surgical privileges (must have an assistant present) and take his name off the call list for the Emergency Medicine Department. This decision was to be privileged communication. The decision of the committee was forwarded to Defendant Hospital's Board of Directors and was eventually approved by the Board. As a result of the action by the Board, the President of Defendant Hospital notified the National Practitioner Data Bank (N.P.D.B).

Thereafter, the N.P.D.B. advised Plaintiff that Defendant Hospital had reported the hospital's action. Plaintiff responded to the N.P.D.B. via letter stating that the information was inaccurate. In December, 1993, Plaintiff sent a letter to the chairman of the hospital's surgical committee requesting reinstatement of his surgical privileges (Trial Exhibit 13). The request was denied by the surgical committee.

In December, 1994, Defendant's Chief of Medical Staff scheduled a meeting with Plaintiff. Plaintiff was not allowed to bring his attorney with him and refused to attend. Plaintiff was later informed that he was suspended. Plaintiff requested a hearing before the Medical Executive Committee. The hearing was scheduled, but postponed at Plaintiff's request and never rescheduled. The N.P.D.B. was advised of the suspension and Plaintiff learned that the N.P.D.B. report stated he was summarily suspended for incompetence, negligence and malpractice.

After the December, 1994 meeting, and prior to a scheduled March, 1995 meeting, the Plaintiff filed a petition in this Court alleging breach of contract, fraudulent

representation, fraudulent concealment, negligent misrepresentation, and mutual mistake.

Plaintiff argues that this lawsuit is about an unnecessary report to the N.P.D.B. containing false information, issued in contravention with an agreement to maintain confidentiality and that the Health Care Quality Improvement Act (H.C.Q.I.A.) 42 U.S.C. § 1101 et seq. (1988 and Supp. V. 1993) does not apply to this case. Yet Plaintiff's first cause of action is for breach of contract in that Plaintiff alleges he was denied due process when Defendant reduced and placed restrictions upon surgical procedures which could have been performed by Plaintiff at Defendant's Hospital for an indefinite period and without a hearing.

It is clear from a review of the H.C.Q.I.A. and *Bryan vs. James H. Homes Regional Medical Center,* 33 F.3d 1318 (1994) that this matter falls under H.C.Q.I.A. From the beginning (in 1993) Plaintiff was the subject of a professional review action. Plaintiff met with the ad hoc committee, reviewed the issues with the committee and agreed to a restriction of his clinical privileges, and also agreed to have a monitor present during certain procedures. This was all voluntary on Plaintiff's part and he could have appealed the matter.

When Plaintiff's clinical privileges were summarily suspended in December, 1994, Plaintiff was notified of the reasons for the suspension and that he had a right to request a hearing within thirty (30) days. Plaintiff made the request, the hearing was set for March 9, 1995, but said hearing was cancelled by Plaintiff and never rescheduled by Plaintiff. There was, therefore, no final hearing at the peer review level.

The decision of a private hospital to revoke, suspend, or limit privileges of a physician or other member of the medical staff is subject to limited judicial review to ensure that the hospital substantially complies with its medical staff bylaws, as well as ensure that the bylaws provide for basic notice and fair hearing procedures. *Babcock vs. St. Frances Med. Ctr.,* 4 Neb. App. 362, 543 N.W.2d 749 (1996). Plaintiff knew of and had participated in all of the proceedings up to the time his privileges were summarily suspended, and, thus, at that point, Plaintiff had the opportunities to be heard, yet chose not to reschedule the March 9, 1995 hearing he requested and postponed. The Court cannot find that the evidence produced by the Plaintiff shows by a preponderance of the evidence that the Defendant failed to satisfy the requirements of H.C.Q.I.A. As stated earlier, Plaintiff voluntarily and without objection agreed to the recommendations of the ad hoc committee. Pursuant to *Bryan vs. James E. Holmes Regional Med. Ctr., supra.,* "the presumptive language in the H.C.Q.I.A. means that Plaintiff bears the burden of proving that the peer review process was not reasonable . . . ", and the Court, therefore, finds that Plaintiff has not met his burden.

Plaintiff's other theory for recovery is that Defendant filed a false report to the N.P.D.B. Pursuant to 42 U.S.C. § 11133(a) (1995): "Each health care entity which – (C) in the case of such an entity which is a professional society, takes a professional review action which adversely affects the membership of the physician in the society, shall report to the Board of Medical Examiners . . . " The word "shall" means the Defendant did not have a choice. When the Plaintiff's privileges were restricted and later summarily suspended (Trial Exhibit 15), both actions were

reported as required. Failure to so report subjects Defendant Hospital to a civil money penalty of up to $10,000.

Plaintiff argues that the second report stated that Plaintiff was suspended for " . . . incompetence, malpractice or negligence . . . " but there was no such finding by a peer group. Plaintiff alleges, therefore, the report was false and Defendant knew it to be false when it was sent to the N.P.D.B. Defendant's President, Richard Hachten, stated that when he submitted the report he had had no conversation with the ad hoc committee regarding sending the report, nor did he make the determination that the Plaintiff was "incompetent, committing malpractice or negligent". Further, there was no evidence that the report was filed with malicious intent.

If a hospital investigates a complaint or concern as part of the peer review process and suspends a physician for longer than 30 days, the hospital is required to report the suspension to the N.P.D.B., as stated above. The hospital enjoys immunity as long as the report demonstrates reasonableness and is protective of the physician's due process rights. 42 U.S.C. § 1112(a)(1)-(4). Plaintiff received notice and was given an opportunity to be heard as well as an opportunity to examine the evidence and have an evidentiary hearing. Plaintiff asked for a hearing (March 9, 1994), requested that it be postponed and never objected and never rescheduled. Pursuant to *Babcock, supra.*, the physician then waives the requirement that the enumerated conditions under § 1112(b) be followed if the physician fails to object to the notice or hearing procedures. *Babcock, supra.*

The investigation of Plaintiff was brought about by the hospital's concern over Plaintiff's competence as a

surgeon. Plaintiff's surgical privileges were restricted, monitored and later suspended and, pursuant to the rules governing medical hospitals, all of the actions were reported to the N.P.D.B. Although there may have been no finding of "incompetence, malpractice or negligence" as Plaintiff contends, that was the purpose of the (Hospital's) investigation and it was under this category which Defendant Hospital had to mark when it filed its report with the N.P.D.B. If the hospital had marked "other" on the N.P.D.B. form, the explanation for the suspension would have revealed that Plaintiff was under investigation for concerns about his competence as a surgeon. Although the report fell short of giving a complete explanation of what transpired, Plaintiff still declined to proceed with the final hearing. *Fobbs v. Holy Cross Health System Corp., et al,* 789 F.Supp. 1054 (1992)

The Court, therefore, finds that there appears to be no evidence of malice upon the part of Defendant Hospital. Defendant Hospital's investigation and resulting actions were based on a physician's professional competence or professional conduct that adversely affects, or could adversely affect, the health or welfare of a patient. The Court, therefore, finds that the hospital is immune from any liability for damages under the Act. *Babcock, supra.* Besides seeking damages based on a breach of contract, Plaintiff is also seeking damages for libel. This Court previously dismissed the Plaintiff's cause of action for defamation.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that Defendant's Motion for Summary Judgment is sustained and Plaintiff's Motion for Summary Judgment is overruled.

DATED this **23rd** day of **December, 2003.**

BY THE COURT:

/s/ Joseph S. Troia
Joseph S. Troia
District Judge

CC: David S. Houghton
P. Shawn McCann

OPINION OF THE NEBRASKA COURT OF APPEALS

(Not Designated for Permanent Publication)

Case Title

JOHN F. MCLEAY, M.D., APPELLEE,
V.
BERGAN MERCY HEALTH SYSTEMS CORP., DOING BUSINESS AS BERGAN MERCY MEDICAL CENTER, APPELLANT.

Case Caption

MCLEAY V. BERGAN MERCY HEALTH SYS.

Filed February 27, 2001. No. A-99-474.

Appeal from the District Court for Douglas County: JOSEPH S. TROIA, Judge. Reversed and vacated, and cause remanded for a new trial.

P. Shawn McCann and Joseph S. Daly, of Sodoro, Daly & Sodoro, for appellant.

David S. Houghton and J.P. Sam King, of Lieben, Whitted, Houghton, Slowiaczek & Cavanagh, P.C., for appellee.

McLEAY V. BERGAN MERCY HEALTH SYS.

Filed February 27, 2001. No. A-99-474.

IRWIN, Chief Judge, and SIEVERS and CARLSON, Judges.

CARLSON, Judge.

INTRODUCTION

Bergan Mercy Health Systems Corp., doing business as Bergan Mercy Medical Center (Bergan Mercy), appeals from a $451,000 judgment entered against it pursuant to a jury verdict in this breach of contract action. For the reasons set forth below, we vacate the jury's verdict, reverse the judgment of the district court, and remand the cause for a new trial.

BACKGROUND

John F. McLeay, M.D., is a general surgeon in Omaha, in solo private practice since 1963. He has been a member of Bergan Mercy's medical staff since that date and, at all times relevant, had hospital privileges at both Bergan Mercy and St. Joseph Hospital.

On or about October 19, 1992, McLeay received a letter from Dr. Richard Feldhaus, then chief of the medical staff at Bergan Mercy and a member of the hospital's surgery advisory committee. In that letter, Feldhaus advised McLeay that the committee had been authorized to undertake an investigation of patient care provided by McLeay to unspecified patients at Bergan Mercy. McLeay received no further communications from Bergan Mercy until December 2, when he received a letter from Richard Hachten II, president of Bergan Mercy, advising him that a monitoring requirement for surgeries had been imposed upon him. Shortly after receiving this letter, McLeay had a personal conversation with Feldhaus, complaining that he had not received any advance notice about the monitoring requirement. On December 28, McLeay received a telephone call from Dr. Dwaine Peetz, chairman of the hospital's surgical advisory committee. Peetz asked McLeay to

meet with him and two other members of an ad hoc committee to review some medical charts and to discuss the monitoring requirement. McLeay met with Peetz and another member of the ad hoc committee, Dr. Daniel McKinney, on the morning of December 29. At that time, McLeay was told the names of eight patients whom he had treated over the past 15 months and whose quality of care underlay the imposition of the monitoring requirement. No files or charts regarding those patients were available for review at that meeting. The discussion focused upon the committee's decision to continue the monitoring requirement. According to McLeay, the discussion resulted in an oral agreement that (1) the monitoring requirement would remain in place for 6 to 12 months, (2) the monitoring requirement would be kept confidential, and (3) the committee would provide McLeay with a "laundry list" of relatively minor surgical procedures that could be performed without a monitor.

On January 8, 1993, McLeay met again with Peetz, Feldhaus, and McKinney of the ad hoc committee. On that date, the eight cases were again discussed. At the conclusion of that meeting, McLeay was presented with a copy of the minutes of a previous meeting of the ad hoc committee held the previous day without McLeay. Those minutes included the following:

> Based on the information available to the Committee, the members decided on the following actions:
>
> 1. An imposition of a restriction of Dr. John McLeay's surgical privileges in which there is a requirement that the physician must have an assistant for all surgery performed. Dr. Anthony Pantano or a Board Certified surgeon may serve as the assistant.

2. Dr. McLeay will be removed from the call list for the Emergency Medicine department.

The minutes also contained the following statement: "These minutes are privileged communications and are not subject to disclosure or legal discovery proceedings under [Neb. Rev. Stat. §§] 71.2046 to 2048." McLeay signed the minutes, but later testified that he understood from his meeting on January 8 that the monitoring requirement would continue for 6 months to 1 year and that he would be provided with a laundry list.

On January 12, 1993, McLeay was presented with a copy of the minutes from a meeting of the ad hoc committee held the previous day. Those minutes were stamped "confidential" at the top and again contained the statement: "These minutes are privileged communications and are not subject to disclosure or legal discovery proceedings under [Neb. Rev. Stat. §§] 71.2046 to 2048." Those minutes stated, inter alia:

> Following discussion, motion was made and unanimously passed approving the restriction of Dr. John McLeay's surgical privileges as follows:
>
> 1. An imposition of . . . a requirement that the physician must have an assistant for all surgery performed. Dr. Anthony Pantano or a Board Certified surgeon may serve as the assistant.
>
> . . . .
>
> 4. The following minor procedures were agreed upon as those which Dr. McLeay could perform without an assistant:
>
> 1. removal of skin lesions
>
> 2. carpal tunnel repair

3. outpatient hernia repair defined as inguinal hernia including direct, and

4. repair of lacerations.

5. The surveillance of this restriction will be maintained through the normal monitoring mechanisms.

This recommendation will be forwarded to the Board of Directors and is effective January 11, 1993 subject to subsequently [sic] Board approval.

McLeay signed those minutes on a signature line which stated that those minutes were "accepted and agreed to."

On or about February 11, 1993, McLeay received a letter from Hachten advising McLeay that Bergan Mercy's board of directors had approved and accepted the recommendations outlined in the minutes signed by McLeay on January 12. On February 18, McLeay wrote to Peetz asking that a laundry list be provided and listing several suggested procedures he would like to have included on that list. On or about February 26, McLeay received a letter from Hachten advising him that the monitoring requirement had been reported to the National Practitioner Data Bank (NPDB), a national information clearinghouse established by the U.S. government pursuant to the Health Care Quality Improvement Act of 1986 (HCQIA), 42 U.S.C. § 11101 et seq. (1994).

On March 12, 1993, McLeay received a letter from the NPDB advising him of the information reported by Bergan Mercy and notifying him of the procedures to correct any inaccurate information. McLeay responded to the NPDB letter, asserting that the information was inaccurate; the record, however, contains no indication as to the effect of

this response. In a letter dated May 13, 1993, Hachten advised McLeay that the conditions set out in the January 12 minutes would not be modified in any manner.

On December 2, 1993, McLeay sent a letter to Peetz requesting reinstatement of full surgical privileges without a monitoring requirement. That request was denied by the board of directors, according to a letter from Hachten dated June 1, 1994. In that letter, Hachten further stated that "the Board of Directors did request the Medical Executive Committee and the Surgery Ad Hoc Review Committee to develop criteria you may strive to meet in order to have this requirement removed."

McLeay then hired an attorney and had a petition of a lawsuit drafted, and on September 9, 1994, he had a copy of that unfiled petition delivered to Bergan Mercy's lawyers. On December 9, Feldhaus called McLeay to schedule a meeting with him. McLeay asked to have his attorney accompany him, but Feldhaus said attorneys were not invited. McLeay refused to attend without his attorney. Shortly after the conclusion of that telephone call, Hachten telephoned McLeay and read him a letter advising McLeay that his privileges at Bergan Mercy had been summarily suspended, ostensibly because of information relating to a procedure performed by McLeay in 1991. McLeay received that letter a few days later.

On or about December 13, 1994, Hachten sent McLeay a letter advising him that the medical executive committee had voted to continue his summary suspension pending a final decision by the board of directors. On or about January 11, 1995, McLeay, through his attorney, requested a hearing before the medical executive committee. A hearing was scheduled for March 9, but on or about March 8,

McLeay requested a postponement; the hearing was never held. The NPDB was notified of the summary suspension, and on or about March 23, McLeay received a copy of the NPDB report, which stated that he had been summarily suspended because of incompetence, negligence, and malpractice.

On February 26, 1996, McLeay filed an amended petition in Douglas County District Court alleging breach of contract and asserting that he had suffered lost income, damage to his career and reputation, and unspecified general damages. The case was tried to a jury beginning on November 9, 1998.

After Bergan Mercy rested, the jury was instructed that McLeay's action alleged two counts: breach of contract and breach of the hospital bylaws. On November 16, the jury returned a verdict of $451,000 for breach of agreement and $1 for breach of bylaws. Bergan Mercy's subsequent motions for judgment notwithstanding the verdict and for a new trial were overruled on March 30, 1999. Bergan Mercy timely filed the instant notice of appeal on April 29.

ASSIGNMENTS OF ERROR

Bergan Mercy's broad attack upon the decision of the district court consists of a fusillade of 23 asserted and assorted procedural, evidentiary, and legal errors. All but lost in that assault is the first portion of assignment of error No. 17, in which Bergan Mercy asserts that the trial court erred by "admitting into evidence testimony concerning whether Bergan was required to file a Data Bank Report." As further explained below, we find that particular assertion of error to be dispositive of this appeal.

Accordingly, we will not definitively address the remaining assignments of error.

STANDARD OF REVIEW

A civil verdict will not be set aside where evidence is in conflict or where reasonable minds may reach different conclusions or inferences, as it is within the jury's province to decide issues of fact. *Ratigan v. K.D.L., Inc.*, 259 Neb. 283, 609 N.W.2d 376 (2000), A jury verdict will not be set aside unless dearly wrong, and it is sufficient if any competent evidence is presented to the jury upon which it could find for the successful party. *Id.*

When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling. *Ethanair Corp. v. Thompson*, 252 Neb. 245, 561 N.W.2d 225 (1997).

The admissibility of evidence is reviewed for an abuse of discretion where the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court. *State v. Allen*, 252 Neb. 187, 560 N.W.2d 829 (1997). A trial court has the discretion to determine the relevance and admissibility of evidence, and such determinations will not be disturbed absent an abuse of that discretion. *Blue Valley Co-op v. National Farmers Org.*, 257 Neb. 751, 600 N.W.2d 786 (1999).

ANALYSIS

DISPOSITIVE ISSUE: INAPPROPRIATE EXPERT TESTIMONY

Bergan Mercy asserts that the trial court erred in permitting Kelly Clarke, an attorney called by McLeay as an expert witness, to present his opinion as to whether

Bergan Mercy was obligated by law to report its peer review decision to the NPDB. Bergan Mercy had objected to that the testimony on the ground, inter alia, that "it's not proper use of expert testimony." We agree.

In *Kaiser v. Western R/C Flyers,* 239 Neb. 624, 477 N.W.2d 557 (1991), the trial court had been presented with the issue of whether the relevant zoning ordinance precluded operation of a model airplane flying field near the village of Springfield. Both parties had introduced expert testimony in support of their respective interpretations of the Springfield zoning ordinances. The Supreme Court held that this evidence was irrelevant, explaining:

> [E]xpert testimony is relevant and admissible only if it tends to help the trier of fact understand the evidence or to determine a fact issue and that expert testimony concerning the status of the law does not tend to accomplish either of these goals. Expert testimony concerning a question of law is generally not admissible in evidence. . . . The interpretation of a zoning ordinance presents a question of law, and we decline to consider any expert testimony as to what constitutes a "commercial" or a "private" recreational use under the Springfield zoning ordinances.

(Citations omitted.) *Id.* at 628, 477 N.W.2d at 560. Similarly, in *Sports Courts of Omaha v. Brower,* 248 Neb. 272, 534 N.W.2d 317 (1995), a law professor testified, over objection, that the actions taken by an attorney serving as monitor and agent of a corporation constituted a disposition of collateral under provisions of Neb. U.C.C. § 9-504 (Reissue 1980) and that appropriate notice was not given. The Supreme Court held that the trial court erred in permitting the professor to testify on what the Supreme Court deemed to be a matter of statutory interpretation.

Clearly, by these standards, Clarke's testimony, which had the sole purpose of advising the court of the status of the law as it relates to reporting to the NPDB, was irrelevant and inadmissible. It was accordingly an abuse of discretion for the district court to admit it. A judicial abuse of discretion exists when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and a just result. *Westgate Rec. Assn. v. Papio-Missouri River NRD,* 250 Neb. 10, 547 N.W.2d 484 (1996).

However, our conclusion that the trial court erred in admitting Clarke's testimony does not end our inquiry. To constitute reversible error in a civil case, the admission or exclusion of evidence must unfairly prejudice a substantial right of a litigant complaining about evidence admitted or excluded. *Sacco v. Carothers,* 257 Neb. 672, 601 N.W.2d 493 (1999). We believe such prejudice occurred in this case. "Proof in the trial of a jury case should be confined to the issues made by the pleadings, and the admission of testimony wrongfully received in a case tried to a jury is prejudicial error where it may have influenced the verdict." *Witte v. Lisle,* 184 Neb. 742, 746, 171 N.W.2d 781, 783 (1969). Obviously, permitting the jury to decide, as it necessarily had to do under the evidence and instructions, whether Bergan Mercy made its report because the law required it or because it freely chose to do so, may well have influenced the verdict. As we suggest later herein, it appears that the question of whether Bergan Mercy was required by law to report its actions against McLeay is not a jury question. But examination of the jury instructions reveals that the trial court submitted to the jury the fact of Bergan Mercy's filing of an adverse action report with the NPDB as part of what McLeay needed to prove with

respect to his claim that Bergan Mercy breached its bylaws. In short, a matter upon which expert testimony was wrongfully received was submitted to the jury, when as we later suggest the question is one of law for the court. Nebraska case law makes it clear that unless it appears from the record that evidence wrongfully admitted in a jury trial did not affect the result of the trial unfavorably to the party against whom it was admitted, its reception must be considered prejudicial error. *Westgate Rec. Assn., supra; Singles v. Union P. R.R. Co.*, 174 Neb. 816, 119 N.W.2d 680 (1963); *Fries* v. *Goldsby,* 163 Neb. 424, 80 N.W.2d 171 (1956); *Lane v. Burt County Rural Public Power Dist.,* 163 Neb. 1, 77 N.W.2d 773 (1956). Under these circumstances, we find the admission of Clarke's expert testimony to be prejudicial error which necessitates a new trial.

Remaining Assignments of Error

Our holding that a new trial is required makes it undesirable and inefficient for us to attempt to decide Bergan Mercy's remaining assigned errors. We reach this conclusion because the majority of the other assigned errors appear to stem from the fact that this case was seemingly tried with little regard for the role that the HCQIA would play (including as a matter of law) in a case centered around a hospital's discipline of a staff physician. The general rule is that an appellate court is not obligated to engage in analysis not necessary to adjudicate the case and controversy before it. *Springer v. Bohling,* 259 Neb. 71, 607 N.W.2d 836 (2000); *Kelly v. Kelly,* 246 Neb. 55, 516 N.W.2d 612 (1994). However, it is also true that even where a cause is remanded for new trial, other issues raised, but not necessary for disposition of the instant

case, should be addressed where doing so would be in the interest of judicial economy. See, *State v. Porter,* 235 Neb. 476, 455 N.W.2d 787 (1990); *Smith v. Kellerman,* 4 Neb. App. 178, 541 N.W.2d 59 (1995). But, we conclude that attempting to decide the remaining issues in view of the fact that a new trial is required would not be judicial economy.

Many of the remaining issues raised on appeal, for example exhaustion of remedies, the "primary jurisdiction doctrine," the parol evidence rule, and claims of statutory immunity or common-law privilege for actions arising out of the peer review process, are matters that would have been better addressed by various pretrial procedural avenues. We believe, although we do not decide the matter, that the core facts of this case are such that the immunity provisions of the HCQIA are likely implicated in a substantial way. For an excellent discussion of the HCQIA, see *Bryan v. James E. Holmes Regional Medical Center*, 33 F.3d 1318, 1337 (11th Cir. 1994), a case described by the court as "a disciplined physician attempt[ing] to have a jury revisit the adverse decision of his medical colleagues." In *Bryan, supra,* on the basis of immunity under the HCQIA, a $4.2 million judgment in favor of a disciplined doctor against the hospital was reversed, including a state law claim that the hospital had breached its bylaws upon which the jury had found in the doctor's favor and awarded millions of dollars in damages. The *Bryan* court also said that the HCQIA immunity is a "question of law for the court to decide and [the immunity] may be resolved whenever the record in a particular case is sufficiently developed." 33 F.3d at 1332.

It is of no small consequence that the HCQIA creates a presumption favoring immunity which McLeay has the

burden to overcome. Thus, in the interest of judicial economy, we do not attempt to decide all assignments of error, knowing that after this appeal a retrial is likely to be very different from the first trial.

We recognize that the answer of Bergan Mercy does not directly allege that its actions concerning McLeay are immunized under the HCQIA. Nonetheless, the answer does allege that Bergan Mercy "properly filed" notice of its adverse action and "was required to file the report by federal law." Finally, as said earlier, immunity under the HCQIA is a question of law which Congress intended to be resolved at the early stages of litigation, such as by a motion for summary judgment. *Babcock v. Saint Francis Med. Ctr.*, 4 Neb. App. 362, 543 N.W.2d 749 (1996).

We further note, though not raised by the parties in their briefs, lurking issues of potential contractual construction. Bergan Mercy appears to suggest that it should be excused from performance of any contractual obligation of confidentiality because it could not legally meet that obligation due to the reporting requirements of the HCQIA. Presuming, but not deciding, that Bergan Mercy was so obligated, the obvious question then arises, whether by using the term "confidentiality" the parties intended for Bergan Mercy to totally suppress all communication about the consequences of the peer review process, regardless of the HCQIA, or whether they intended that Bergan Mercy would simply refrain from making any communications not statutorily required. In this regard, we read the evidence (and McLeay's contentions) to be that Bergan Mercy made no disclosure except within the peer review process and to the NPDB. If the parties intended that Bergan Mercy would break the law, then McLeay would be precluded from seeking judicial enforcement of

that portion of the contract, since the courts will not aid either party to an illegal contract, *Springer v. Kuhns,* 6 Neb. App. 115, 571 N.W.2d 323 (1997). These issues, again, would appear to be prime candidates for early resolution upon our remand.

CONCLUSION

We conclude that the trial court committed prejudicial and reversible error in permitting McLeay to introduce expert testimony relating to the question of whether Bergan Mercy was obligated by law to report its peer review process actions to the NPDB. We accordingly vacate the jury's verdict, reverse the judgment of the trial court, and remand the cause to the district court for a new trial.

REVERSED AND VACATED, AND CAUSE REMANDED FOR A NEW TRIAL.

IN THE DISTRICT COURT OF DOUGLAS COUNTY, NEBRASKA

JOHN F. MCLEAY, M.D.,	)	**DOC. 934 NO. 716**
Plaintiff,	)	
	)	
vs.	)	**FINDING AND ORDER**
BERGAN MERCY HEALTH SYSTEMS CORP. d/b/a BERGAN MERCY MEDICAL CENTER,	)	
Defendant.	)	

THIS MATTER came on for hearing on the 8th day of January, 1999 on Defendant's Motion for Judgment Notwithstanding Verdict and for New Trial. Plaintiff was represented by David S. Houghton and Defendant was represented by David R. Buntain. After hearing arguments of counsel, the Court took the matter under advisement pending the submission of Plaintiff's brief.

Having now fully reviewed the oral and written arguments of counsel and the law, the Court finds that Defendant's Motions should be overruled. The Court finds that many of Defendant's alleged errors were matters ruled on prior to trial and the Court stands by those rulings.

The Court further finds that any alleged erroneous rulings by the Court during the trial are either supported by law or, should they have been in error, did not prejudice the Defendant to such an extent, if at all, to warrant overturning the jury's decision

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Defendant's Motions for Judgment Notwithstanding Verdict and New Trial are overruled.

DATED this **30th** day of **March, 1999.**

BY THE COURT:

/s/ Joseph S. Troia
Joseph S. Troia
District Judge

CC: David S. Houghton
David R. Buntain

42 U.S.C. § 11101. Findings

The Congress finds the following:

(1) The increasing occurrence of medical malpractice and the need to improve the quality of medical care have become nationwide problems that warrant greater efforts than those that can be undertaken by any individual State.

(2) There is a national need to restrict the ability of incompetent physicians to move from State to State without disclosure or discovery of the physician's previous damaging or incompetent performance.

(3) This nationwide problem can be remedied through effective professional peer review.

(4) The threat of private money damage liability under Federal laws, including treble damage liability under Federal antitrust law, unreasonably discourages physicians from participating in effective professional peer review.

(5) There is an overriding national need to provide incentive and protection for physicians engaging in effective professional peer review.

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42 U.S.C. § 11111. Professional review

(a) In general

(1) Limitation on damages for professional review actions

If a professional review action (as defined in section 11151(9) of this title) of a professional review body meets all the standards specified in section

11112(a) of this title, except as provided in subsection (b) of this section –

(A) the professional review body,

(B) any person acting as a member or staff to the body,

(C) any person under a contract or other formal agreement with the body, and

(D) any person who participates with or assists the body with respect to the action,

shall not be liable in damages under any law of the United States or of any State (or political subdivision thereof) with respect to the action. The preceding sentence shall not apply to damages under any law of the United States or any State relating to the civil rights of any person or persons, including the Civil Rights Act of 1964, 42 U.S.C. 2000e, et seq. and the Civil Rights Acts, 42 U.S.C. 1981, et seq. Nothing in this paragraph shall prevent the United States or any Attorney General of a State from bringing an action, including an action under section 15c of title 15, where such an action is otherwise authorized.

(2) Protection for those providing information to professional review bodies

Notwithstanding any other provision of law, no person (whether as a witness or otherwise) providing information to a professional review body regarding the competence or professional conduct of a physician shall be held, by reason of having provided such information, to be liable in damages under any law of the United States or of any State (or political subdivision thereof) unless such information is false and the person providing it knew that such information was false.

(b) Exception

If the Secretary has reason to believe that a health care entity has failed to report information in accordance with section 11133(a) of this title, the Secretary shall conduct an investigation. If, after providing notice of noncompliance, an opportunity to correct the noncompliance, and an opportunity for a hearing, the Secretary determines that a health care entity has failed substantially to report information in accordance with section 11133(a) of this title, the Secretary shall publish the name of the entity in the Federal Register. The protections of subsection (a)(1) of this section shall not apply to an entity the name of which is published in the Federal Register under the previous sentence with respect to professional review actions of the entity commenced during the 3-year period beginning 30 days after the date of publication of the name.

(c) Treatment under State laws

(1) Professional review actions taken on or after October 14, 1989

Except as provided in paragraph (2), subsection (a) of this section shall apply to State laws in a State only for professional review actions commenced on or after October 14, 1989.

(2) Exceptions

(A) State early opt-in

Subsection (a) of this section shall apply to State laws in a State for actions commenced before October 14, 1989, if the State by legislation elects such treatment.

(B) Effective date of election

An election under State law is not effective, for purposes of,[1] for actions commenced before the effective date of the State law, which may not be earlier than the date of the enactment of that law.

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42 U.S.C. § 11112. Standards for professional review actions

(a) In general

For purposes of the protection set forth in section 11111(a) of this title, a professional review action must be taken –

(1) in the reasonable belief that the action was in the furtherance of quality health care,

(2) after a reasonable effort to obtain the facts of the matter,

(3) after adequate notice and hearing procedures are afforded to the physician involved or after such other procedures as are fair to the physician under the circumstances, and

(4) in the reasonable belief that the action was warranted by the facts known after such reasonable effort to obtain facts and after meeting the requirement of paragraph (3).

A professional review action shall be presumed to have met the preceding standards necessary for the protection set out in section 11111(a) of this title unless the presumption is rebutted by a preponderance of the evidence.

(b) Adequate notice and hearing

A health care entity is deemed to have met the adequate notice and hearing requirement of subsection (a)(3) of this section with respect to a physician if the following conditions are met (or are waived voluntarily by the physician):

(1) Notice of proposed action

The physician has been given notice stating –

(A)(i) that a professional review action has been proposed to be taken against the physician,

(ii) reasons for the proposed action,

(B)(i) that the physician has the right to request a hearing on the proposed action,

(ii) any time limit (of not less than 30 days) within which to request such a hearing, and

(C) a summary of the rights in the hearing under paragraph (3).

(2) Notice of hearing

If a hearing is requested on a timely basis under paragraph (1)(B), the physician involved must be given notice stating –

(A) the place, time, and date, of the hearing, which date shall not be less than 30 days after the date of the notice, and

(B) a list of the witnesses (if any) expected to testify at the hearing on behalf of the professional review body.

(3) Conduct of hearing and notice

If a hearing is requested on a timely basis under paragraph (1)(B) –

(A) subject to subparagraph (B), the hearing shall be held (as determined by the health care entity) –

(i) before an arbitrator mutually acceptable to the physician and the health care entity,

(ii) before a hearing officer who is appointed by the entity and who is not in direct economic competition with the physician involved, or

(iii) before a panel of individuals who are appointed by the entity and are not in direct economic competition with the physician involved;

(B) the right to the hearing may be forfeited if the physician fails, without good cause, to appear;

(C) in the hearing the physician involved has the right –

(i) to representation by an attorney or other person of the physician's choice,

(ii) to have a record made of the proceedings, copies of which may be obtained by the physician upon payment of any reasonable charges associated with the preparation thereof,

(iii) to call, examine, and cross-examine witnesses,

(iv) to present evidence determined to be relevant by the hearing officer, regardless of its admissibility in a court of law, and

(v) to submit a written statement at the close of the hearing; and

(D) upon completion of the hearing, the physician involved has the right –

(i) to receive the written recommendation of the arbitrator, officer, or panel, including a statement of the basis for the recommendations, and

(ii) to receive a written decision of the health care entity, including a statement of the basis for the decision.

A professional review body's failure to meet the conditions described in this subsection shall not, in itself, constitute failure to meet the standards of subsection (a)(3) of this section.

(c) Adequate procedures in investigations or health emergencies

For purposes of section 11111(a) of this title, nothing in this section shall be construed as –

(1) requiring the procedures referred to in subsection (a)(3) of this section –

(A) where there is no adverse professional review action taken, or

(B) in the case of a suspension or restriction of clinical privileges, for a period of not longer than 14 days, during which an investigation is being conducted to determine the need for a professional review action; or

(2) precluding an immediate suspension or restriction of clinical privileges, subject to subsequent notice and hearing or other adequate

procedures, where the failure to take such an action may result in an imminent danger to the health of any individual.

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42 U.S.C. § 11151. Definitions

In this chapter:

(1) The term "adversely affecting" includes reducing, restricting, suspending, revoking, denying, or failing to renew clinical privileges or membership in a health care entity.

(2) The term "Board of Medical Examiners" includes a body comparable to such a Board (as determined by the State) with responsibility for the licensing of physicians and also includes a subdivision of such a Board or body.

(3) The term "clinical privileges" includes privileges, membership on the medical staff, and the other circumstances pertaining to the furnishing of medical care under which a physician or other licensed health care practitioner is permitted to furnish such care by a health care entity.

(4) (A) The term "health care entity" means –

(i) a hospital that is licensed to provide health care services by the State in which it is located,

(ii) an entity (including a health maintenance organization or group medical practice) that provides health care services and that follows a formal peer review process for the purpose of furthering quality health care (as

determined under regulations of the Secretary), and

(iii) subject to subparagraph (B), a professional society (or committee thereof) of physicians or other licensed health care practitioners that follows a formal peer review process for the purpose of furthering quality health care (as determined under regulations of the Secretary).

(B) The term "health care entity" does not include a professional society (or committee thereof) if, within the previous 5 years, the society has been found by the Federal Trade Commission or any court to have engaged in any anticompetitive practice which had the effect of restricting the practice of licensed health care practitioners.

(5) The term "hospital" means an entity described in paragraphs (1) and (7) of section 1395x(e) of this title.

(6) The terms "licensed health care practitioner" and "practitioner" mean, with respect to a State, an individual (other than a physician) who is licensed or otherwise authorized by the State to provide health care services.

(7) The term "medical malpractice action or claim" means a written claim or demand for payment based on a health care provider's furnishing (or failure to furnish) health care services, and includes the filing of a cause of action, based on the law of tort, brought in any court of any State or the United States seeking monetary damages.

(8) The term "physician" means a doctor of medicine or osteopathy or a doctor of dental surgery or medical dentistry legally authorized to practice medicine and surgery or dentistry by a State (or any individual who, without authority holds himself or herself out to be so authorized).

(9) The term "professional review action" means an action or recommendation of a professional review body which is taken or made in the conduct of professional review activity, which is based on the competence or professional conduct of an individual physician (which conduct affects or could affect adversely the health or welfare of a patient or patients), and which affects (or may affect) adversely the clinical privileges, or membership in a professional society, of the physician. Such term includes a formal decision of a professional review body not to take an action or make a recommendation described in the previous sentence and also includes professional review activities relating to a professional review action. In this chapter, an action is not considered to be based on the competence or professional conduct of a physician if the action is primarily based on –

(A) the physician's association, or lack of association, with a professional society or association,

(B) the physician's fees or the physician's advertising or engaging in other competitive acts intended to solicit or retain business,

(C) the physician's participation in prepaid group health plans, salaried employment, or any other manner of delivering health

services whether on a fee-for-service or other basis,

(D) a physician's association with, supervision of, delegation of authority to, support for, training of, or participation in a private group practice with, a member or members of a particular class of health care practitioner or professional, or

(E) any other matter that does not relate to the competence or professional conduct of a physician.

(10) The term "professional review activity" means an activity of a health care entity with respect to an individual physician –

(A) to determine whether the physician may have clinical privileges with respect to, or membership in, the entity,

(B) to determine the scope or conditions of such privileges or membership, or

(C) to change or modify such privileges or membership.

(11) The term "professional review body" means a health care entity and the governing body or any committee of a health care entity which conducts professional review activity, and includes any committee of the medical staff of such an entity when assisting the governing body in a professional review activity.

(12) The term "Secretary" means the Secretary of Health and Human Services.

(13) The term "State" means the 50 States, the District of Columbia, Puerto Rico, the Virgin

Islands, Guam, American Samoa, and the Northern Mariana Islands.

(14) The term "State licensing board" means, with respect to a physician or health care provider in a State, the agency of the State which is primarily responsible for the licensing of the physician or provider to furnish health care services.

(7)

No. 06-246

Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

In The
Supreme Court of the United States

JOHN F. McLEAY, M.D.,

Petitioner,

v.

BERGAN MERCY HEALTH SYSTEMS CORP.,
doing business as Bergan Mercy Medical Center,

Respondent.

On Petition For Writ Of Certiorari
To The Supreme Court Of Nebraska

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

I. Whether the Nebraska Supreme Court decision lacks finality for Writ of Certiorari jurisdiction under 28 U.S.C. § 1257.

II. Whether Petitioner has presented compelling reasons to grant the Petition, where the Nebraska Supreme Court Opinion upholding immunity under the Health Care Quality Improvement Act ("HCQIA") does not conflict with the decision of another state court of last resort or of a United States Court of Appeals.

III. Whether the Petitioner has presented compelling reasons to grant the Petition for Writ of Certiorari, where the Nebraska Supreme Court Opinion upholding the provisions of the HCQIA putting the burden of proof upon a physician to prove that a reasonable jury could find that the peer review process was unreasonable does not conflict with the decision of another state court of last resort or of a United States Court of Appeals and where a physician never assigned as err or the said burden of proof standard.

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INTRODUCTION

The Nebraska Supreme Court decision is not a final judgment. The case was remanded back to the District Court for further proceedings on Petitioner Dr. McLeay's claim for equitable relief seeking reinstatement of hospital privileges.

Petitioner has failed to present any "compelling reason" for his Petition for Writ of Certiorari to be granted. See Sup. Ct. R. 10. Specifically, Petitioner fails to demonstrate that the Nebraska Supreme Court's Opinion is in conflict with a decision of another state court of last resort or of a United States Court of Appeals. See Sup. Ct. R. 10(b).

Furthermore, with respect to the standard of review issue set forth in HCQIA not only does the Nebraska Supreme Court decision not conflict with the decision of a state court of last resort or the United States Court of Appeals, but physician did not even raise an issue to the Nebraska Supreme Court challenging the standard of review set forth in the HCQIA statute.

STATEMENT OF THE CASE

Bergan Mercy Health Systems, Corp. ("Bergan") was sued by Dr. John F. McLeay ("McLeay") after a Peer Review Board suspended his hospital privileges. Initially, McLeay's privileges were restricted because of concerns about the quality of care he provided. McLeay accepted and agreed to the Ad Hoc Committee Meeting Minutes that required him to be monitored during certain surgical procedures.

Contrary to McLeay's claim that he was never found to be liable for incompetence, negligence or malpractice, the Ad Hoc Peer Review Committee that considered the matter found and stated:

> The members reviewed all of the information made available to the Committee through its investigative process. It was determined significant evidence was present in order to justify a recommendation for action. This evidence included two concern reports from nursing staff on the floors, two concern reports from nursing staff in the surgery department, two concern reports from anesthesiologists, and a number of cases identified as having inappropriate or substandard care.

Bergan did, as required by federal law, made a report to the National Practitioner's Data Bank that McLeay had been suspended because of "incompetence, negligence and malpractice."

In December of 1993, McLeay wrote a letter requesting reinstatement and acknowledged that "1992 was an aberration of my surgical care" and stated that he had his "wake-up call." When Bergan denied the request for reinstatement and when Bergan notified McLeay of further specific concerns, McLeay made a request for a hearing. Bergan informed McLeay of its concerns about a surgical judgment or techniques in eight specific cases, informed McLeay of a report from a monitoring physician concerning the care of three patients, an internal medicine physician's concern about a patient, and documentation regarding two patients. Additionally, Bergan's record numbers relating to cases were listed in a letter sent to McLeay providing notice of a hearing on the matter. McLeay did not attend the hearing and Bergan informed

McLeay he was suspended. McLeay was then informed of his right to a hearing before the Medical Executive Committee and in fact, requested such a hearing. A hearing was scheduled before the Medical Executive Committee but then postponed at McLeay's request and, subsequently, was never rescheduled by McLeay. Instead, McLeay filed the within lawsuit. Although McLeay had been suspended because of incompetence, negligence and malpractice, based upon the investigation of the Ad Hoc Peer Review Committee, no final administrative hearing was held on the matter because of McLeay's request to cancel the hearing and because of the lawsuit filing.

Bergan was sued by McLeay for breach of contract and breach of bylaws. Initially, the case was tried to a jury and McLeay was awarded a verdict. The jury verdict was appealed then vacated by the Nebraska Court of Appeals due to error in the admission of expert testimony. On remand, Bergan filed an Amended Petition asserting additional claims. The District Court granted Bergan's Motion for Summary Judgment based upon the immunity provisions under HCQIA for hospitals engaged in peer review activity.

McLeay appealed to the Nebraska Supreme Court and the Nebraska Supreme Court initially reversed the summary judgment remanding the case for trial, but then later granted Bergan's Motion for Rehearing and reversed itself. This time the Supreme Court affirmed the District Court's grant of summary judgment on the grounds that Bergan was immune from damages under HCQIA, but reversed and remanded on the equitable claim of reinstatement.

On appeal to the Nebraska Supreme Court, McLeay had asserted as error, four issues summarized by the Nebraska Supreme Court as follows:

> That the District Court erred (1) determining that Bergan was immune under the HCQIA; (2) failing to find that there were issues of material fact about the requirements to report and the falsity of the reports or malice in submitting them, which issues affect immunity; (3) failing to determine that immunity did not apply to equitable claims; and (4) determining that McLeay had waived his claims against Bergan.

McLeay did not make any assignment of error that the Court had applied an improper standard for purposes of summary judgment under HCQIA. The Nebraska Supreme Court held that under § 11112(a) of HCQIA, Bergan is presumed to reasonably believe that it was acting in the furtherance of quality care in taking action against McLeay and that McLeay failed to present evidence sufficient to overcome the presumption. The Court specifically found "McLeay failed to meet his burden to present evidence that would allow a reasonable jury to conclude that Bergan's peer review process failed to meet the standards of the HCQIA." The Nebraska Supreme Court did note that "in cases involving the use of expert testimony after the fact to show that the standard of care was actually met, courts uniformly hold that the testimony will not rebut the presumption." The Court further distinguished the case of the Tenth Circuit Court of Appeals case of *Brown v. Presbyterian Healthcare Servs.*, 101 F.3d 1324 (10th Cir. 1996) on the basis the *Brown* court allow the use of experts to testify about the review process itself. In *Brown*, the experts had concluded the defendants were not acting to further quality health care. The Supreme Court specifically found plaintiff's expert witness testimony did not rebut the presumption of reasonableness. One expert was noted to have provided no specifics about how the

standard of care was met or what the standard of care was and the other expert did not provide any testimony about surgical standard of care.

The Nebraska Supreme Court affirmed the District Court on the finding of immunity under HCQIA for McLeay's claim for money damages. However, the Nebraska Supreme Court reversed and remanded the case back for further proceedings as to McLeay's claim for equitable relief. The Nebraska Supreme Court held HCQIA immunity applies to suit for money damages but does not provide immunity for actions seeking equitable relief. Since McLeay, in addition to seeking damages also sought reinstatement of his privileges as a remedy, the case was remanded back for further proceedings on the question of McLeay's equitable relief.

ARGUMENT

I. Lack of Finality

As basis for jurisdiction, McLeay asserts the statutory provision of 28 U.S.C. § 1257 (2000) and suggests the Opinion of the Nebraska Supreme Court as set forth in Appendix at A-1 is a "final opinion." Section 28 U.S.C. § 1257(a) provides:

> *Final judgments or decrees* rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court by Writ of Certiorari where the validity of a decree or statute of the United States is drawn in question or where the validity of a statute of any state is drawn in question on the ground of its being repugnant to the Constitution, treaties, or

> laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States. *Emphasis supplied.*

The Nebraska Supreme Court decision in question sets forth in the Appendix at A-1 to A-21 and reported at *McLeay v. Bergan Mercy Health Systems Corp.*, 714 N.W.2d 7 (Neb. 2006) is not a final judgment. McLeay had assigned as error the trial court's application of the HCQIA immunity to McLeay's equitable claim for reinstatement of hospital privileges. The Nebraska Supreme Court noted a few cases have applied HCQIA immunity to equitable claims for reinstatement without analyzing the issue. Instead of following this precedent, the Court looked at the language of HCQIA and specifically 42 U.S.C. § 11111 and found that it states it applies to suits for money damages and concluded the statute does not include actions seeking equitable relief.

As to the equitable claim for reinstatement, the Nebraska Supreme Court further noted the District Court had not considered Bergan's claim of waiver for failure to exhaust administrative remedies. The Court wrote: "Accordingly, we reverse and remand for further proceedings to determine whether McLeay is entitled to equitable remedies." The Court further wrote: "We also determine, however, that McLeay's claim for equitable relief are not subject to HCQIA immunity, and he may be able to proceed on those claims if they were not waived. Because the District Court did not pass on that topic, we reverse the summary judgment to the extent it affects claims for equitable relief and remand the case for further proceedings."

In *Jefferson v. City of Tarrant*, Ala. 522 U.S. 75, 118 S.Ct. 481, 139 L.Ed. 2d 433 (1997), this court declined to exercise certiorari jurisdiction regarding a claim that a wrongful death resulted from deprivation of federal rights under 42 U.S.C. § 1983, where the Alabama Supreme Court had remanded the case for resolution of the remaining state law claims. The court noted:

> Congress has limited our review of state – court decisions to "final judgments or decrees rendered by the highest court of a state in which a decision could be had." 28 U.S.C. § 1257(a). The decision we confront does not qualify as a "final judgment" within the meaning of § 1257(a).

The state court case had been remanded by the Alabama Supreme Court for further proceedings on state-law claims, the outcome of which could moot the federal question presented in the case. The court dismissed the Writ of Certiorari for want of a final judgment. See also *O'Dell v. Espinoza*, 456 U.S. 430, 102 S.Ct. 1865, 72 L.Ed. 2d 237 (1982).

In this case, some but not all of Petitioner's claims have been resolved. The further unique issue here is that Petitioner has asserted no federal claims for relief. Rather, the federal issue arose because of the Hospital's ability to raise the immunity under HCQIA. The Nebraska Supreme Court decision was not yet final, as it is on remand to the state court to make a determination on the equitable claim for reinstatement of privileges.

II. No Conflict With Decisions Regarding Relevance of Expert Testimony Under HCQIA

The decision of the Nebraska Supreme Court does not conflict with the decision of this Court nor with any Court of Appeals including the Tenth Circuit Court of Appeals. Accordingly, Petitioner has not carried his burden demonstrating any "compelling reasons" for the Petition for Writ of Certiorari to be granted. See Sup. Ct. R. 10. McLeay asserts the Nebraska Supreme Court was wrong along with a majority of other courts in interpreting the 42 U.S.C. § 11112(a) of HCQIA. The Nebraska Supreme Court and the majority of other jurisdictions have "overwhelmingly held that a physician's showing that the standard of care was met, or that the Professional Review Board reached the wrong conclusion, does not meet the burden of overcoming the presumption of a reasonable belief that the hospital's furthering health quality health care." Generally, it has been held that expert testimony as to the quality of the physician's care is irrelevant to the inquiry as to whether the hospital acted on a reasonable belief. See *Sugarbaker v. SSM Health Care*, 190 F.3d 905, 913 (8th Cir. 1999); *Mathews v. Lancaster Gen. Hosp.*, 87 F.3d 624 (3d Cir. 1996); *Imperial v. Suburban Hosp. Ass'n*, 37 F.3d 1026 (4th Cir. 1994); *Egan v. Athol Memorial Hosp.*, 971 F. Supp. 37 (D. Mass. 1997; *Meyer v. Sunrise Hosp.*, 22 P.3d 1142 (Nev. 2001).

McLeay's argument here is that the Nebraska Supreme Court decision and the overwhelming majority of other cases interpreting HCQIA conflicts with the Tenth Circuit case of *Brown v. Presbyterian Healthcare Servs.*, 101 F.3d 1324 (10th Cir. 1996). *Brown* is the only reported decision which appears to have language suggesting expert testimony about the standard of care may be used

to rebut a presumption of reasonableness under HCQIA. However, as noted by the Nebraska Supreme Court, the *Brown* case has been distinguished by other courts under the unique facts of the case. In *Brown*, the expert testimony did not focus solely upon the question of the physician's compliance with the standard of care, but also opined with respect to the review panel process itself. The Nebraska Supreme Court noted other courts had distinguished *Brown* because of the unique facts and quoted extensively from *Meyer v. Sunrise Hosp.*, 22 P.3d 1142 (Nev. 2001) as follows:

> While *Brown* does discuss the use of expert testimony in evaluating issues of immunity under HCQIA, the decision of *Brown* centered upon the fact that Dr. [Arlene] Brown was able to produce significant evidence to support her allegations that information submitted by the defendants in her medical review process was false or misleading. Indeed, Dr. Brown produced evidence that the individuals who investigated her actions were involved in encouraging another doctor to move his practice so as to be in direct competition with her. In other words, the defendants in *Brown* had conspired to manufacture allegations of improper behavior by Dr. Brown so as to put Dr. Brown out of business. In the setting, Dr. Brown's expert concluded that the defendants were not acting to further quality health care. Neither were their actions reasonable under the facts of the case. It was for this reason that the Federal District Court in *Brown* refused to grant summary judgment on the basis of HCQIA immunity, a decision that was affirmed by the United States Court of Appeals for the Tenth Circuit.

Finally, the Nebraska Supreme Court noted factually the testimony of McLeay's experts "cannot rebut the presumption." The presumption is focused on what the review panel knew when it acted. Therefore, later expert testimony that "McLeay acted appropriately in the cases reviewed cannot be used ' ' rebut the presumption." In describing the testimony of McLeay's experts, the Nebraska Supreme Court noted one expert "did not provide details about the standard of care" and "did not provide specifics about how the standard of care was met or what the standard of care was." As to the other expert, he was not a surgeon, did not assist in surgery and did not provide testimony about the surgical standard of care at issue. Thus, under the facts of the case even if a broad interpretation of the *Brown* case were to be followed by the Nebraska Supreme Court, Petitioner's claim would fail as the proferred expert testimony was factually insufficient to rebut the presumption of immunity.

III. There Is No Conflict as to the HCQIA Immunity Burden of Proof Standard and Petitioner Never Claimed Error Regarding the Burden of Proof

Petitioner asserts a conflict exists between the United States Court of Appeals for the Tenth Circuit and most other courts regarding whether HCQIA's rebuttal presumption modifies the standard by use for granting summary judgment. Said assertion is made without citing the Tenth Circuit case that purportedly applied the familiar summary judgment standard of Fed.Civ.P. 56 to questions of immunity under HCQIA. One would suppose the Petitioner may be looking to the *Brown*, supra, decision of the Tenth Circuit. As noted by Petitioner, the majority of

the courts and the Nebraska Supreme Court concluded that HCQIA "adds a rather unconditional twist to the burden of proof in our summary judgment standard of review . . . [a] court must determine whether the physician satisfied his or her burden of producing evidence that would allow a reasonable jury to conclude that the hospital's peer review process failed to meet the standards of the HCQIA . . . [T]he the presumption means that the plaintiff bears the burden of proving that the review process was not reasonable." Respondent would note that this is the very same standard used in the Tenth Circuit case of *Brown*, supra. The *Brown* court had simply found under the facts of the case, the presumption had been rebutted by plaintiff's evidence. The court wrote:

> Thus, in determining whether a peer review participant is immune under the Health Care Quality Improvement Act, the proper inquiry for the court is whether Dr. Brown has provided sufficient evidence to permit a jury to find she has overcome, by a preponderance of the evidence, any of the four statutory elements required for immunity under 42 U.S.C. § 11112(a). See, e.g., *Austin*, 979 F.2d at 734. In this case, we believe Dr. Brown presented sufficient evidence to overcome the presumption and allowed the issue to be decided by the jury. (Footnote 9 at 1324).

Second, Petitioner never assigned as error before the Nebraska Supreme Court that the trial court had applied an incorrect standard of review with respect to the summary judgment burden of proof of HCQIA immunity. The Nebraska Supreme Court summarized McLeay's Assignments of Error as follows:

1. Determining that Bergan was immune under the HCQIA.
2. In failing to find that there were issues of material fact about the requirements to report and the falsity of the reports or malice in submitting them, which issues affected immunity.
3. In failing to determine that immunity did not apply to equitable claims and
4. Determining that McLeay had waived his claims against Bergan.

App. A-9.

CONCLUSION

Petitioner has not established any compelling reasons for this Court to grant the Petition for Writ of Certiorari and has failed to demonstrate certiorari jurisdiction. Therefore, Respondent respectfully requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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